

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

SNE ENTERPRISES, INC.

and

Case 9-CA-40915
9-CA-41191
9-CA-41291
9-CA-41338

UNITED STEEL WORKERS OF
AMERICA, AFL-CIO-CLC

Eric J. Gill, esq.,
for the General Counsel
Grant T. Pecor, esq., and Steven K. Girard, esq.,
of Grand Rapids, Michigan for the Respondent
Waymon D. Free of Barboursville,
West Virginia for the Charging Party

DECISION

Statement of the Case

Eric M. Fine, Administrative Law Judge. This case was tried in Huntington, West Virginia, on May 4 to 6, 2005. The charges were filed by the United Steel Workers of America, AFL-CIO-CLC (the Union). A consolidated complaint and second consolidated complaint issued on August 23, 2004, and September 30, 2004¹ alleging that SNE Enterprises, Inc., (Respondent) violated Section 8(a)(1) of the Act by: telling employees they would not receive a wage increase due to the Union's representation petition; promising employees a wage increase if they rejected the Union as their collective-bargaining representative; and promulgating and maintaining a rule prohibiting employees from discussing discipline and disciplinary investigations. The consolidated complaint alleges Respondent discharged employees Benny Moore and Dana Adkins (D. Adkins) in violation of Section 8(a)(1) and (3) of the Act, and discharged Ruth Adkins (R. Adkins) in violation of Section 8(a)(1) and (4) of the Act. The consolidated complaint also alleges Respondent withheld a wage increase from its employees in violation of Section 8(a)(1) and (3) of the Act.

¹ All dates are in 2004 unless otherwise indicated.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following²

Findings of Fact

I. Jurisdiction

Respondent, a corporation, has been engaged in the manufacture of windows and doors at its Huntington, West Virginia facility from where it annually purchases goods valued in excess of \$50,000 directly from points outside of West Virginia. The Respondent admits and I find it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

Arthur Steinhafel is Respondent's director of plant operations. Steinhafel's office is located in Mosinee, Wisconsin from where he oversees the operation of the Huntington plant. Steinhafel testified the current owners took over the Huntington plant toward the latter part of 2001. Steinhafel also worked for the prior owners and had been associated with the Huntington plant since 2000. Susan Dingess is Respondent's human resource manager at the Huntington plant. Dingess was hired on January 27, 2004. James George was the plant manager from June 20, 2002, until May 3, 2004, and he was replaced as plant manager by Tim Dragoo on May 18, 2004. Mike Fisher is production supervisor and Tim Darby was Respondent's environmental safety supervisor until June 11.³ The Huntington plant is also staffed by line supervisors, and lead persons. The lead persons were been determined to be statutory supervisors in a unit determination proceeding in Case 9-RC-17883.

A. The union campaign

Waymon Free was the Union's lead organizer for the union campaign at Respondent's Huntington plant which began in January 2004. Free sent a certified letter to George dated February 6, naming 23 individuals as members of the Union's organizing committee. Benny Moore's name was included on the list. By letters to George dated February 13, February 23 and 25, Free added more names to the list of organizing committee members. The Union filed a petition for election on February 20 in Case 9-RC-17883. An election was held on May 20, with 87 ballots in favor of the Union, and 82 against, and 3 challenged ballots. The Respondent filed objections to the election. In *SNE Enterprises, Inc.*, 344 NLRB No. 81 (2005), the Board remanded objections back to the Regional Director for Region 9 for further consideration.

² In making the findings herein, I have considered all the witnesses' demeanor, the content of their testimony, and the inherent probabilities of the record as a whole. In certain instances, I have credited some but not all of what a witness said. See *NLRB v. Universal Camera Corporation*, 179 F. 2d 749, 754 (C.A. 2), reversed on other grounds 340 U.S. 474 (1951). All testimony has been considered, if certain aspects of a witness's testimony are not mentioned it is because it was not credited, or cumulative of the credited evidence or testimony set forth above. Further discussions of the witnesses' credibility appear below as warranted.

³ Respondent admits that Steinhafel, Dingess, George, Dragoo, Fisher and Darby, during the times they occupied the above described positions, were its supervisors and agents within the meaning of Section 2(11) and 2(13) of the Act.

B. Respondent withholds general wage increases

Steinhafel testified that at the Huntington plant the practice for general wage increases changed from annual to biannual increases in 2003. Steinhafel testified a general increase was given at the Huntington plant twice in 2003, once in April and once in October in the amount of 1.5 percent each. Steinhafel testified Respondent's practice regarding general wage increases was to review whether raises are warranted based on Respondent business performance, and increases given by area competition. He testified this is done in March and September, and then the increases are normally given in April and October. He testified Respondent does not always give 1.5 percent increases. In one of Respondent's documents entitled, "Huntington Wage Structure Grid" with an effective date of July 1, 2002, there is a statement that reads:

Wage adjustments, other than performance grade progressions, will be reviewed twice per year. Dates are projected to be April 1st, 2003 and October 1st, 2003. Whether or not an employee receives an increase in April or October is subject to management approval and based upon individual performance and work record.

Steinhafel testified he thought this document implemented Respondent's system of biannual reviews for general wage increases. Steinhafel testified the above quoted paragraph accurately describes that component of Respondent's compensation plan.

General Counsel witness Charles South is employed at Respondent's Huntington plant as a machine operator and has worked there close to 7 years. South testified the employees received a general wage increase in 2002, but he could not recall the month. South testified the employees were eligible for a general wage increase in September 2003, but South did not receive it until December 2003 in the amount of 1.5 percent. South testified that, in January or February 2004, then Plant Manager George held a meeting with an estimated 40 to 100 employees. George said he had some really good news. George said there was an incentive plan in place for which specifics would be given at a later meeting. George also said "it looks we had raises coming up." South testified George "said that we had the raise coming up that would be available in March or April. Everybody was pretty stoked about that. Everybody was pretty happy." South attended a second meeting concerning wage increases in late in January or early February 2004. Steinhafel conducted the meeting. Steinhafel wrote out the specifics concerning a new weekly bonus plan. South testified Steinhafel also spoke about going to a biannual raise system, and employees were going to have raises in March and September, which was to be the employees' general wage increase.

Steinhafel testified he was at the Huntington plant in January 2004 holding informational meetings with employees. During the meetings, Steinhafel discussed Respondent's compensation package, which included a general wage increase, a wage grid change, and an incentive plan. Steinhafel had with him a document entitled, "Huntington Wages and Incentive Plan." Included in the typewritten document is the statement, "General increases will be available to employees that meet performance criteria. Twice per year, March and September."⁴ Steinhafel testified he did not read the memo at the January employee meetings word for word. Rather, it was used as a reference point. Steinhafel testified he told employees one of the three elements of the compensation package was a discretionary general increase that will be reviewed two times per year. He testified he did not tell employees they would be receiving a raise in April or October, nor did he mention the amount of any such increase.

⁴ The document also describes a new "Wage Grid" and an "Incentive plan" both of which the parties stipulated were implemented in 2004.

In March 2004, Respondent posted on the plant bulletin board an undated notice to "All Hourly Employees" from Steinhafel with the subject being the "Wage increase." The notice reads as follows:

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During my visit in January I discussed with you two changes to your compensation package, the incentive plan and a wage increase.

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At the time I advised you the components of the new incentive plan and advised you we would be implementing the incentive plan in March. The new incentive plan is being rolled out as planned.

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A wage increase was scheduled to be announced and implemented the end of this week. I regret to inform you that we cannot legally implement the wage increase at this time. We have contacted our lawyers and we were advised we cannot implement any raise while the union vote is pending unless we had decided upon and told you the amount prior to February 25, 2004, when the union petition was filed.

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Thus, as required by law we must freeze wages at this time until the union issue has been decided. If the union wins the election we will have to bargain with the union and reach agreement before any wage increase is implemented. If the union is rejected in the vote, we will be free to implement a wage increase after the election.

We are very sorry about this and would have preferred to give a wage increase as we discussed in January, but the union petition prevents it.

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South testified that, upon seeing Respondent's posting, South spoke to his then supervisor Brian Beckett. South told Beckett that South thought it was pretty sad that because they were planning on having a union vote the company was going to pull back on a wage increase. Beckett said he did not have anything to do with it.

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On March 29, Free sent Steinhafel a certified letter, a copy of which was circulated as a flyer to employees. Free wrote as follows:

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It has come to the United Steelworkers of America's attention that you distributed a 'Notice to Employees' stating that a wage increase was scheduled to be announced and implemented last week. You also stated that this was discussed with employees in January.

The United Steelworkers of America would like to go on record informing you that we have no intention of filing any charges against SNE Enterprises for implementing any wage increase you have promised your employees.

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The Union agrees that workers should never be promised improvements by management and then reneged on later, for any reason.

The Union regrets you would feel it necessary to inform employees that only if the Union is rejected in the vote, that you would be free to implement a wage increase.

Therefore, with the Union's agreement to implement a wage increase as promised, we would feel that it would be necessary to file charges against the company's actions only if you decide not to implement the wage increase as promised.

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Another memo from Steinhafel to employees was posted at the Huntington plant dated April 2, with the subject being the "Wage Increase Issue." The memo reads:

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Recently, we posted a Notice to employees regarding our inability to provide a wage increase at this time due to the union petition and pending election. It is unlawful to give a wage increase to employees after a union petition is filed, but before the election is held because the law views it as the employer possibly attempting to "buy" employee

votes.

Regardless of the union's position on the increase, it could be objectionable conduct and could result in the election being overturned. We do not want to do anything at this time that would interfere with employee rights or might be viewed as unlawful or objectionable.

As we said before, if the union loses the election, the employer is free to implement a wage increase after the election. If the union wins the election, the law requires the employer to negotiate in good faith with the union over any increase.

We thank you for your patience and understanding.

As always, if you have any questions, please do not hesitate to contact me.

Free testified that around July 27, the Union passed out another handbill to employees entitled, "CHARGES FILED ON WAGE INCREASES." A discussion of the Union's wage increase allegation was included in the handbill as well as the fact that the Union had filed an unfair labor practice charge over the matter.

Steinhafel testified there are three elements in Respondent's compensation package. He testified, "One was the raise, or discretionary general increase that was given two times per year based on performance of the company and assessments, general assessments, that were done." He testified another element in compensation is the wage grid which contains steps of progression and is applicable to new employees who receive quarterly increases based on a performance criteria and who usually top out on the wage grid during their first year of work. Respondent implemented the quarterly review for the wage grid assessments in February 2004. Prior to that it took an employee a minimum of 18 months to top out on the wage grid. Once an employee tops out on the wage grid, they only receive general wage increases.⁵

Steinhafel testified that in 2004, there was no general wage increase given. Steinhafel testified that if the Union's petition had not been filed, it would have been very difficult to tell whether a general increase would have been given, "because we had not went through the general assessment. No recommendations were made and the owners had not approved anything. So, the process had not really evolved. So there's no way to tell." Steinhafel testified the determination as to whether to give a general wage increase is based on business conditions including performance both by the business and employee. Steinhafel testified in 2004, as a result of the Union filing the election petition, Respondent did not even consider a general wage increase, no amount for a general wage increase had been determined, and no review had occurred. Steinhafel testified a general wage increase is not based on a hard formula, rather on a general assessment. There are a variety of indicators that are looked at, "as well as what competition is doing in the area and ultimately what the owners' ceiling is."

1. Analysis

In *Earthgrains Baking Cos.*, 339 NLRB 24, 28 (2003), enfd. 116 Fed. Appx. 161 (9th Cir. 2004) (Not published) it was stated:

The Board law is quite clear that, in the midst of an on-going union organizing or election campaign, an employer must proceed with an expected wage or benefit adjustment as if

⁵ Steinhafel testified the third element of the compensation package is a bonus incentive plan which was implemented in March 2004 for the hourly employees. There are several elements to the plan such as plant performance, employee attendance and employee productivity targets. It is a weekly plan with bonuses paid out on a monthly basis.

the organizing or election campaign had not been in progress. *Grouse Mountain Lodge*, 333 NLRB 1322, 1324 (2001); *America's Best Quality Coatings Corp.*, 313 NLRB 470, 484 (1993); *Atlantic Forest Products*, 282 NLRB 855, 858 (1887). Nevertheless, the Board has recognized an exception to this rule--an employer may postpone the implementation of such a wage or benefit adjustment if it makes clear to its employees that the granting of the adjustment is not dependent upon the result of the union organizing campaign and that the 'sole purpose' of the postponement is to avoid the appearance of influencing employees in their decision to support the union or influencing the election's outcome. *Grouse Mountain Lodge*, supra; *KMST-TV, Channel 46*, 302 NLRB 381, 382 (1991). In making such an announcement, however, an employer acts in violation of Section 8(a)(1) of the Act by attributing its failure to implement the expected wage or benefit adjustment to the presence of the union or by disparaging or undermining the union by creating the impression it impeded the granting of the adjustment. *Twin City Concrete*, 317 NLRB 1313, 1318 (1995); *Atlantic Forest Products*, supra. Herein, during her cross-examination, Savage conceded that, during February, as they 'normally' had received wage increases at that time of year, voting unit employees inquired as to when they would be receiving their wage increase in 2002, and one subject of her speech to the groups of employees was Respondent's explanation as to why the anticipated 'new' wage increases would not be given during the election campaign. In this regard, while Savage may have read from the text that the granting of a raise at that time 'could be considered a bribe ...,' she eviscerated the exculpatory effect of this language by gesturing with her hands behind her back and commenting that her hands were tied behind her back and the Charging Party was 'preventing' the wage increase and that, if a raise was given, the Charging Party would immediately file an unfair labor practice charge. Put another way, in unmistakable language, Savage did exactly what the law prohibits; she placed the onus upon the Charging Party by attributing the employees' not receiving their anticipated wage increase directly to it.' Accordingly, by her extemporaneous gesture and comments, Savage's conduct became patently unlawful, and Respondent thereby violated Section 8(a)(1) of the Act. *Earthgrains Co.*, 336 NLRB No. 117 (2001); *Grouse Mountain Lodge*, supra; *Centre Engineering, Inc.*, 253 NLRB 419, 421 (1980).

In *Atlantic Forest Products*, supra at 857-858, the Board distinguished *Uarco Inc.*, 169 NLRB 1153 (1968), a case where the employer was found not to have engaged in objectionable conduct over wages. In *Atlantic Forest Products*, supra at 857-858, the Board noted that:

In *Uarco*, the employer posted and distributed a notice to employees informing them that an annual wage and benefit adjustment would be postponed to 'avoid the appearance of vote-buying' in the upcoming representation election. A month later, *Uarco's* plant manager gave a prepared campaign speech justifying its actions and also sent a letter to employees reiterating its intent to pay the 'going wage rates' in the area, 'with or without a union.' After the election, which the Union lost, the employer adjusted wages and benefits accordingly.

The Board reversed the Regional Director's finding that the employer's announcement concerning the withheld annual wage increase was objectionable, concluding, inter alia, that the employer's 'announcement... and its subsequent campaign statements (did not) shift to the (union) the onus for the postponement of adjustments in wages and benefits for employees it sought to represent (nor did it) disparage and undermine the (union) by creating the impression that it stood in the way of their getting planned wage increases and benefits. Rather, the Board found that the employer in *Uarco* 'made clear in its campaign statements... that whether or not its employees were represented by a union, it planned (to adjust wages) into conformity with prevailing rates in the area; and that the

sole purpose of its announcement... was to avoid the appearance that it sought to interfere with their free choice in any elections which might be directed.'

In *Atlantic Forest Products*, supra. at 858-9, in finding that the employer's announcement and withholding of a wage increase there violated Section 8(a)(1) of the Act, the Board stated:

...the Respondent's statements, at best, conveyed conflicting signals to employees as to its motivation for postponing the wage increase. Thus, the newsletter began by telling employees the wage delay is 'required to avoid the appearance of vote-buying' and that '(w)ith or without a union, we intend to follow (its policy of paying 'above the best rates for this area').' The Respondent, however, then compared its freedom without a union to adjust wages 'as conditions require' to wage rates under a union contract which are 'frozen at the existing level,' and concluded by stating that 'in view of the election on January 8th, we cannot say what increase there will be.' We agree with the judge that such statements suggest an 'immediate (wage) increase without a union but a delay for an indefinite period of negotiations for an uncertain increase with a union,' and accordingly, find the newsletter improperly attributed the wage postponement to the Union.

In the instant case, General Counsel witness South credibly testified that employees received a general increase in 2002.⁶ Steinhafel testified that based on a memo with an effective date of July 1, 2002, Respondent implemented its current compensation package requiring a biannual review for general wage increases. As a result, Steinhafel testified there were two general wage increases given to the Huntington employees in 2003 of 1.5 percent each, one in April and one in October based on reviews performed in March and September considering Respondent's business performance and area increases concerning competition.

South credibly testified that then Plant Manager George informed employees during a meeting in January or February they had raises coming up that would be available in March or April, 2004. South attended a second meeting during this same time period conducted by Steinhafel. South credibly testified that, during the meeting, Steinhafel told employees Respondent was going to a biannual raise system and employees were going to have raises available in March and September, which was to be a general wage increase. South's testimony is confirmed by a typewritten memo Steinhafel had with him at the time of the meeting, which stated, "General increases will be available to employees that meet performance criteria. Twice per year, March and September."⁷

Any doubt of Respondent's intent to have provided employees with a general wage increase in March 2004, is eliminated by Steinhafel's March posting to employees, where it is stated, "A wage increase was scheduled to be announced and implemented the end of this week."⁸ The memo went on to state based on the advise of counsel, Respondent had

⁶ I found South, a current employee at the time of his testimony, considering his demeanor to be a credible witness to the extent his memory would permit. He testified in a straight forward fashion with fairly good recall.

⁷ I do not credit Steinhafel's testimony that he merely told employees there was to be a discretionary general increase that would be reviewed two times a year. Steinhafel's testimony appears to be purposefully qualified to meet Respondent's litigation position, and it is undercut by the reading of his own memo which states "general increases will be available", as well as by South's credible testimony

⁸ Steinhafel's testimony at the hearing that it was difficult to tell whether a general increase

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determined it could not legally implement the wage increase at that time, "while the union vote is pending unless we had decided upon and told you the amount prior to February 25, 2004, when the union petition was filed." Steinhafel went on to state as required by law Respondent was required freeze wages until the "union issue has been decided." Steinhafel stated in the memo if the Union wins the election Respondent would have to bargain with the Union and reach agreement before any wage increase is implemented. Steinhafel stated if the Union is rejected in the vote, Respondent will be free to implement a wage increase after the election. Steinhafel ends his message by stating, "We are very sorry about this and would have preferred to give a wage increase as we discussed in January, but the union petition prevents it." On March 29, Free sent a letter to Steinhafel stating the Union had "no intention of filing any charges against SNE Enterprises for implementing any wage increase you have promised your employees." Free stated that since Respondent had the Union's agreement to implement a wage increase, the Union would file charges against Respondent "only if you decide not to implement the wage increase." The Union publicized Free's letter to employees. Steinhafel responded by posting another notice to employees again citing Respondent's "inability to provide a wage increase at this time due to the union petition and pending election" due to an employer's using a wage increase to possibly buy votes. Steinhafel stated regardless of the Union's position on the increase, "it could be objectionable conduct and could result in the election being overturned." Steinhafel stated, "As we said before, in the union loses the election, the employer is free to implement a wage increase after the election. If the union wins the election, the law requires the employer to negotiate in good faith with the union over any increase."

I find that Steinhafel's March and April memos violated Section 8(a)(1) of the Act by informing employees they would not receive a planned wage increase due to the Union's representation petition; and by promising the employees to implement the wage increase if they rejected the Union as their collective bargaining representative; and that Respondent's withholding of general wage increases following the issuance of the memos violated Section 8(a)(1) and (3) of the Act. Steinhafel informed the employees in his March memo that Respondent planned to implement a general wage at the end of the week, but it could not be implemented while a union vote was pending. The employees were told Respondent must freeze wages until the union issue has been decided, and if the union was rejected by the employees Respondent was free to implement a wage increase after the election. Steinhafel stated in his March and April memos Respondent would have preferred to give a wage increase, but the union petition prevents it. Thus, Respondent directly attributed the employees' failure to receive a planned wage increase to the presence of the Union and its petition for election, and informed employees that receipt of the wage increase was dependent on their rejecting the Union as their collective bargaining representative. Such conduct is violative of the Act. See, *Earthgrains Baking Co.*, 339 NLRB 24, 28 (2003) enfd. 116 Fed. Appx. 161 (9th Cir. 2004) (Not published); and *Atlantic Forest Products*, 282 NLRB 855 (1987).⁹

would have been given if the Union's petition had not been filed appears to be concocted to comport with Respondent's legal position, as he plainly announced to employees in writing that a wage increase was scheduled to be announced and implemented at the end of the week of his March posting. In view of that posting, as well as his demeanor at the hearing, I also discredit his claim that Respondent had not made an assessment as to whether a general wage increase was in order, and his claims that the owners had not approved anything. I also find it extremely unlikely, that since Steinhafel's memo announced that the wage increase was scheduled to be implemented at the end of the week, that the amount of the wage increase had not been determined or at least discussed as Steinhafel claimed.

⁹ Cases cited by Respondent do not require a different result. In *American Mirror Co.*, 269 NLRB 1091, 1094 (1984), no violation was found concerning the withholding of a wage increase

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I do not find Respondent's contention that since no precise figure was formulated for the wage increase, the increase itself cannot be awarded as part of the make whole remedy. Steinhafel's March memo to employees unequivocally states "a wage increase was scheduled to be announced and implemented the end of this week." Therefore Respondent has the ability to calculate in a nondiscriminatory fashion what that wage increase would have been using the criteria it would have followed. Steinhafel testified Respondent's biannual general increase program was formulated in June 2002, and introduced in 2003, where Respondent relied on its own performance and increases by area competition to derive its two increases given to employees in 2003. Thus, Respondent has criteria available from which to calculate the size of the general wage increases. See, *Otis Hospital*, 222 NLRB 402, 404-405 (1976) enfd. 545 F.2d 252 (1st Cir. 1976); and *Autozone Inc.*, 315 NLRB 115, 133 (1994) enfd. 83 F.3d 422 (6th Cir. 1996). I also do not find Respondent's instituting an incentive program in 2004, or changing its wage grid would have impacted on the general wage increase in 2004, as there was no notice to employees or testimony that the programs were linked in terms of impacting the size of the general increase. Moreover, despite the fact that those programs were implemented in 2004, Steinhafel wrote Respondent's employees that they would have been scheduled for a general increase in March but for the Union petition.

Respondent argues at page 36 of its post-hearing brief that:

Section 10(b) provides that 'no complaint shall be based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board...' 29 U.S.C. Sec. 160(b). Nonetheless, despite no charge ever having been filed on the matter, the General Counsel at the hearing indicated that he was seeking increases for allegedly withheld increases in both April 2004 and October 2004. Accordingly, any

during an election campaign because it was concluded that, "no wage increase was determined, promised, scheduled, or announced." Steinhafel's testimony reveals that Respondent implemented a system of biannual general wage increases in July 2002, that wage increases of 1.5 percent were given in April and October 2003. South testified that in meetings in January or February 2004, first Plant Manager George said the employees had a raise "coming up that would be available in March or April." South testified that in a subsequent meeting, during the same period, Steinhafel spoke about going to a biannual raise system, and that employees were going to have raises made available in March and September, which was to be the employees' general wage increase. Steinhafel followed this up with his March memo stating, that "During my visit in January I discussed with you two changes to your compensation package, the incentive plan and a wage increase." In the memo, Steinhafel told employees that, "a wage increase was scheduled to be announced and implemented the end of this week." He then informed employees that Respondent could not implement the increase while the Union vote was pending. Steinhafel ended his message by stating, "We are very sorry about this and would have preferred to give a wage increase as we discussed in January, but the union petition prevents it." Thus, a general wage increase was scheduled, promised, and announced in the instant case. Similarly, *Great Atlantic & Pacific Tea Co.*, 192 NLRB 645, 645-646 (1971), enfd. 463 F.2d 184 (5th Cir. 1972), cited by Respondent is distinguishable. There the respondent had made no prior promise of a wage increase. The Board in finding a violation was not warranted stated there was no evidence the respondent there sought to capitalize on the absence of a wage increase by connecting the absence with the union. In the instant case, Respondent did just the opposite, it told employees a scheduled wage increase would not be implemented because of the Union's election petition, and then informed them that Respondent could implement the increase only if the Union lost the election.

allegation that the Respondent unlawfully withheld a general wage increase in September/October 2004 is barred by Section 10(b) and inappropriate for consideration now.

5 In *American Electric Power Co.*, 302 NLRB 1021, 1021, fn. 1, (1991), enfd., 976 F.2d 725, (4th Cir. 1992) the Board stated:

10 In agreeing with the judge that the complaint was properly amended at the hearing to allege the application of the Corporate Code of Ethics to Columbus Southern Power Company (CSP) in December 1985 and the issuance of the revised Corporate Code of Ethics in January 1987, we note that the Board can add new allegations to a complaint based on events that occur after a charge is filed if the allegations are related to the conduct alleged in the timely charge and developed from that conduct while the charge was pending before the Board. See *Davis Electrical Constructors*, 291 NLRB 33, 34 (1988) (Citing *NLRB v. Fant Milling Co.*, 360 U.S. 301, 307 (1959)).¹⁰

20 Moreover, it has been the longstanding policy of the Board to find violations for matters not specifically alleged in the complaint but that were fully litigated. See *Cardinal Home Products*, 338 NLRB 1004, 1007 (2003); *Pergament United Sales*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990); *Casino Ready Mix, Inc. v. NLRB*, 321 F.3d 1190, 1199-1200 (D.C. Cir. 2003); *Marshall Durban Poultry Co.*, 310 NLRB 68 fn. 1 (1993), enfd. in relevant part 39 F.3d 1312 (5th Cir. 1994), and *Monroe Auto Equipment Co.*, 230 NLRB 742, 751 (1977).

25 In the instant case, Steinhafel testified Respondent introduced biannual wage increases in 2003, and two wage increases were given that year.¹¹ The credited testimony reveals that Steinhafel announced during a meeting around January 2004, that Respondent was going to a biannual raise system, and employees were going to have raises available in March and September, which was to be their general wage increase. In fact, Steinhafel had a document at the meeting for a reference point which stated, "General increases will be available to employees that meet performance criteria. Twice per year, March and September." By memo to employees in March, Steinhafel wrote that a wage increase was scheduled to be announced and implemented the end of this week. The memo went on to state upon advice of counsel Respondent could not implement "any raise while the union vote is pending...". At the time of the unfair labor practice trial in May 2005, Respondent's objections to the election had not been finally decided. The parties stipulated that Respondent did not implement any general wage increase in 2004, nor was there any claim that one had implemented in 2005, although the trial dealt with Respondent's wage increases. The consolidated complaint alleges in paragraph 9(a) that, "Since about March 2004, the Employer has withheld a wage increase from its employees."

40 I find that as of 2003 Respondent implemented a system of biannual wage increases for the spring and fall of each year. I find that the reason Respondent discontinued its March 2004 wage increase and any subsequent general wage increases was because of its employees' union activities, and that the failure to implement any wage general wage increases since the scheduled March 2004 increase was closely related to and arose out of the same set of circumstances to Respondent's refusal to implement the March increase. Accordingly, I find Respondent discontinued its biannual general increases as a result of the employees union

¹⁰ See also, *Procter and Gamble Mfg. Co., v. NLRB*, 658 F.2d 968, 985 (4th Cir. 1981)

50 ¹¹ South testified from recall that he did not actually receive his October 2003 wage increase until around December. However, Respondent's records will reveal when the wage increase was actually implemented in the employees' paychecks.

activity, and that its failure to implement a raise in September 2004, and any subsequent March and September raises thereafter, resulting from the employees' union activity, is violative of Section 8(a)(1) and (3) of the Act.

5 *C. Respondent discharges employee Benny Moore*

Benny Moore worked at the Huntington plant from August 1997, as an assembler until his February 23 discharge.¹² Mike Fisher was Moore's supervisor. Moore initiated the Steelworkers' campaign at the Huntington facility in January 2004, when Moore called Free. Moore told Free employees were interested in organizing and asked to set up a meeting in January. Moore called other workers about joining the Union campaign including, Chad Edwards, Ed Frye, and Cliff Maynard. Free held meetings which Moore attended the first of which was at the end of January at the union hall in Huntington. They discussed how to organize and the formulation of an organizing committee. Moore signed a union card on February 5, and then began asking other employees to sign cards. Moore obtained signatures from about eight employees on cards. Moore testified he solicited cards at the plant during breaks and lunch periods. He denied soliciting cards during working time or in work areas.

Moore testified he used to be friends with employee Cliff Maynard and they worked together in the past. Moore testified he approached Maynard in the plant to talk about the Union in mid February 2004. Moore testified they were on the sash line working while they talked and the conversation was during work time. Moore denied asking Maynard to sign a card stating he never asked him to sign one. Moore testified employees customarily talk to each other while they are working about things other than work, and lead persons frequently came into the area and engaged employees in conversation on non work related topics. Moore testified former Lead Person Ruth Adkins sold candy bars, and Lead Person Chad Edwards sold honey to employees. Moore bought honey from Edwards while he was working. Moore was not aware of any one disciplined for soliciting at work.

Moore credibly testified to the following: On February 23, Fisher called Moore to the front office where Moore met George, Dingess, and Fisher.¹³ George told Moore an employee came to George twice and accused Moore of trying to get the employee to sign a union card during working time. Moore denied it, stating Moore knew better. Dingess asked Moore if he had anything else to say. Moore said no and again denied the accusation. The management personnel then left and returned in about 5 or 10 minutes. When they returned, George said they made some phone calls, and it was Moore's word against the other employee's, and they were going to terminate Moore. Moore said ok, and he was escorted out of the plant. They did not name Moore's accuser. No one from management had ever previously talked to Moore about soliciting other employees at work. Moore knew there was a posting at the plant about solicitation, but he did not read it.¹⁴

¹² Moore had not received any discipline prior to his discharge.

¹³ George and Fisher were no longer employed by Respondent at the time of the hearing.

¹⁴ To the extent there were differences, I credit Moore's version of this meeting over the one provided by Dingess. I do not credit Dingess' claim that Moore said he had seen Respondent's no solicitation policy posted at the plant. Moore had no reason to deny seeing the policy posted as he admitted he was aware he was not allowed to solicit card signatures during working time. On the other hand, considering her demeanor and other testimony, Dingess impressed me as a witness who had a tendency to alter conversations to enhance Respondent's position

Earnest Wright was employed by Respondent close to 3 years at the time of the hearing. Wright was on the Union's organizing committee. Wright testified he passed out union cards but not on company time. Wright testified he talked to employees after work and during breaks about the Union. Wright testified they were clear during union meetings that they were not to speak to employees while they were working. Wright saw a notice to employees dated February 12, posted on Respondent's bulletin board. The notice stated:

We have received complaints from employees that they are being solicited to sign union cards during work time. Solicitation of union cards is treated as verbal solicitation under this policy. Employees should refrain from soliciting union cards or any other types of solicitation during working time. Please restrict any and all solicitation to breaks and lunch periods or before or after the shift. Make sure the person you are soliciting is also on break or lunch and it is not during their working time.

The posted rule also stated, "Violation of this policy may result in disciplinary action up to and including discharge." Wright testified that Laura Ticket, a quality control person, used to collect for a NASCAR pool, while the employees were working.

Charles South, a machine operator, had worked at the Huntington plant for close to 7 years. South credibly testified he was aware of employees walking around the work area soliciting. South testified, "solicitation is virtually every day. It's all over the plant. It's open." South testified he had been solicited for candles by John Debord, for Girl Scout Cookies by Dave Debord, for kitchen knives and Easter eggs by Lead Person R. Adkins, and honey from Lead Person Chad Edwards. South testified the solicitation was during working time. South testified supervisors were around when this occurred as they regularly circulate the lines, and the line leads were at the lines all of the time. South testified Mike Reynolds is a lead or a supervisor in the Shipping Department. South testified, in prior years, Reynolds organized an NCAA basketball tournament pool in the spring and Reynolds asked for South's participation during work time. South testified Debra Selbe was the former human resources manager at the plant. Selbe headed a planning committee for plant related activities such as cookouts, and Christmas dinner. South was a committee member. South testified Selbe told the committee at a meeting to make sure they circulated as much as they could at break and at lunch to sell as many tickets as they could and with a "big wink and a nod," which South understood to mean during working time. South testified the tickets were sold during working time and at break.

R. Adkins worked for Respondent for over 6 years until her June 25 discharge, at which time She was a lead person for about 2 years. R. Adkins credibly testified employees regularly talked among themselves about non work related topics while working. They also sold things such as candy to other employees. R. Adkins testified she sold Easter eggs, candy bars and knives to employees while R. Adkins and the employees were working. She testified supervisors were nearby when this occurred, and that she sold to supervisors. R. Adkins also sold to people in the human resources department including Selbe. R. Adkins testified supervisors did not say anything when she sold the items to them. Rather, they would ask her at Easter time, "because I would sell every Easter for our youth group at Church," R. Adkins testified she was not on break for these conversations. R. Adkins named LeAnn Carpenter as a supervisor who engaged her in these conversations. No one from management told R. Adkins she could only sell at certain times.

1. Respondent's witnesses

Cliff Maynard works as a material handler as such he moves glass racks to and from the glass line. Maynard was friends with Moore in the past as they had worked together and had

been neighbors. In January 2004, Moore talked to Maynard about joining the Union, and at first Maynard said he was interested. However, Maynard testified he complained to his supervisor about Moore in February 2004. Maynard testified Moore approached and asked him to sign a union card and come to union meetings around six or seven times while Maynard was working and Moore was working on the line setting glass. Maynard told Moore to stop, but he did not. Maynard estimated this occurred two times a day for over a week period when Maynard made the complaint. Maynard testified it was posted on the bulletin board that Moore was not allowed to ask Maynard to sign a card in the plant during working hours.

Maynard filed a written complaint about Moore with Maynard's supervisor on February 20. The statement written by Maynard reads, "Benny Moore has repeatedly called my house and has repeatedly stopped me in the plant during working hours to try and get me to sign union cards and to get me to go to union meetings." On February 20, Maynard met Dingess and George in Dingess' office. Maynard told them what happened and Dingess typed a statement for Maynard's signature. The statement reads:

On Feb. 19, 2004, my job required me to go to the green line production area to obtain glass carts. The following situation occurred between 10:00 a.m. and 11:00 a.m. during regular work time.

I was approached by Benny Moore and asked to sign a Union card.

This has happened to me several times when I had to go to that area of the plant to pick up carts.

I told him previously that I wasn't interested in signing a card. I believe the last time he did the same thing was either Thursday or Friday last week. I told him I wouldn't sign a card.

I told him I was not interested in signing anything until I understood both sides and I wasn't interested in signing it. He encouraged me to sign and I again said no. The conversation lasted about 2 minutes.

He keeps calling me at home every night. He calls me nightly around 8:00 p.m.

It has gotten to the point that I don't feel comfortable going up front to get the carts anymore.

This is becoming very aggravating to me.¹⁵

Maynard testified he told Dingess that Moore refused Maynard's repeated requests to leave Maynard alone. Maynard testified he worked in an area with a lot of individuals. However, he denied employees talk about things other than work while working. When asked if they talked about sports, Maynard replied, "Don't have time to talk to nobody." Maynard testified people sold items at work quite often, but not while he was working.

Dingess became the human resource manager at the Huntington plant in January. She testified Respondent had a solicitation policy in effect when she arrived that was published in Respondent's January 2002 employee handbook. Dingess testified a couple of supervisors came to her and said they received employee complaints that they were being solicited to sign union cards during work time. Dingess spoke to George about the need to remind employees about Respondent's solicitation policy. When asked if her enforcement of the solicitation policy was sparked by union solicitations, Dingess testified, "Well, it was - it certainly brought the issue to the forefront, but it was just one of many that we utilized - that I was looking into at that period of time to make sure that we were following them consistently." Dingess testified they posted

¹⁵ Dingess testified the statement was taken on February 20, but was mistakenly dated February 29.

the solicitation policy in early February after George called Steinhafel about the employee complaints. She testified Steinhafel made the decision that the policy be reposted. Dingess denied knowledge of employees soliciting knives, eggs, or honey in the plant.

5 Dingess testified, after Maynard complained about Moore trying to solicit Maynard's signature on a Union card during work time, she asked the supervisor to have Maynard to put the complaint in writing. Upon receipt of the document, Dingess met Maynard in George's presence and she typed a more detailed statement for Maynard, which he read and signed.¹⁶ Dingess testified Fisher, George, and herself met with Moore shortly after Dingess and George met with Maynard. Moore denied soliciting Maynard's signature during working time. The three management officials then went into her Dingess' office and called Steinhafel. Dingess testified George told Steinhafel that Maynard and Moore gave different accounts of the incident, and they felt Maynard had been truthful. They concluded Moore had not been truthful and had done what Maynard accused him of. Dingess testified it was the consensus to terminate Moore, but the final decision was Steinhafel's. Dingess claimed they discussed with Steinhafel that Moore was soliciting union cards, but they did not discuss the Union.

20 Dingess testified that, following the call to Steinhafel, the three returned to the conference room and George told Moore that he had violated Respondent's no-solicitation policy and he had not been truthful in the investigation therefore he was terminated. Dingess testified Moore was terminated, without a prior warning, for violating the no solicitation policy, for harassing an employee by repeatedly keeping him from doing his job, and for lying during Respondent's inquiry.

25 Steinhafel confirmed Dingess version of the phone call between George, Dingess, Fisher and Steinhafel concerning Moore. He also testified he told George it was Steinhafel's recommendation to terminate Moore because he violated the no solicitation policy, harassed an employee, and he lied during the interview to management. Steinhafel testified he was involved in the decision because, "When there's critical decisions that are made with the facility I'm involved in those decisions just as we'll involve legal counsel or others." Steinhafel denied that during the phone call with Fisher, Dingess and George that Moore's position regarding the Union was discussed, but Steinhafel admitted he knew Moore was soliciting on behalf of the Union. Steinhafel denied Moore was terminated for his support of the Union, stating the same thing would have happened if Moore had solicited Girl Scout Cookies. Steinhafel testified the plant manager can discharge employees over routine matters such as attendance, otherwise the plant manager uses Steinhafel as a guide. Steinhafel testified employee Constance Kruger was terminated for soliciting in 2001, but unlike with Moore, Steinhafel was not involved in that termination. Rather, it was just brought to his attention. Kruger's termination report reads, "Soliciting on Company Time", with no further explanation. Steinhafel testified he was aware of no other incidents of in plant solicitation other than Kruger and Moore.

45 Chad Edwards is employed by Respondent as a production lead person. Edwards testified he last sold honey at Respondent's facility at least 3 years prior to his testimony, and that he thought the plant was not owned by the current ownership at the time. Edwards testified that, since that time, he asked former Human Relations Manager Selbe if Edwards could post an automobile for sale and she said they were not allowed to post any personal items. Edwards testified he had seen other individuals sell things like candy or honey during work time and that

50 ¹⁶ Dingess thought she learned Maynard was having a problem on the same date he signed the handwritten statement and she talked to Maynard the same day. Dingess thought this was the same day Maynard reported the problem to his supervisor.

there had been several cases. Edwards testified R. Adkins sold Easter eggs, but the last time he bought anything was around 2 and ½ to three years prior to his testimony. He testified he did not recall seeing R. Adkins selling things since then. Edwards testified he saw Mike Hughes selling wax coated bears during work time in past years. Edwards testified he saw Brian Debor selling Girl Scout Cookies or something for his child. Edwards was uncertain as to the dates and times this occurred. Edwards testified they never approached him while he was working. Edwards did not know of anyone who was ever disciplined for selling items at work. Edwards testified he did not know it was a problem or a violation of any rule to sell items during work time until he asked permission to post the ad to sell his car.

2. Credibility

I have, considering their testimony and demeanor, concluded Moore asked Maynard to sign a union card during working time. I note that Moore was a strong union adherent who admitted to calling Maynard at home and talking to him in the plant during working time about the Union. Yet, Moore incredibly denied ever asking him to sign a union card, while admitting he obtained card signatures from other employees.¹⁷ While I find Moore did ask Maynard to sign a union card during working time, I find Maynard, during his testimony, exaggerated the number of encounters during work time where Moore asked him to sign a card. Maynard testified Moore asked him to sign a union card and attend union meetings around six or seven times while Maynard and Moore were working. Maynard estimated this occurred two times a day for over a week period when Maynard made the complaint. However, in Maynard's typewritten statement taken by Dingess on February 20, Maynard stated Moore asked him to sign a card at work on February 19, which was a Thursday, and he thought the last time it happened was "either Thursday or Friday last week." Thus, Maynard's testimony at the hearing appears to be an exaggeration of what he reported to Respondent around the time of the incident. That Maynard was willing to exaggerate to advance Respondent's cause was also demonstrated by his denial that he ever talked at work to his co-workers about non work related topics during working time. Both Moore and R. Adkins credibly testified that such conversations regularly occurred at work, and were tolerated by Respondent's officials. Moreover, there was no claim by Respondent's witnesses that such conversations were not permitted.

I find Dingess and Steinhafel testified in the role of advocates rather reporting what transpired in an objective and unbiased fashion. Respondent maintained a specific section in its Hourly Employee Handbook, which issued in January 2002, entitled "A WORD ABOUT UNIONS." The section contains the statements, "A third party coming between the Company and the team members can often create friction and discord." The section ends with the statement, "The Company believes a union is not necessary and not in the best interest of either the Company or its team members." Union official Free sent a certified letter to George dated February 6, naming 23 individuals, including Moore, as members of the Union's organizing committee at Respondent's plant. On February 12, Respondent posted on its bulletin board a no solicitation rule stating in part, "We have received complaints from employees that they are being solicited to sign union cards during work time. Solicitation of union cards is treated as verbal solicitation under this policy. Employees should refrain from soliciting union cards or any other types of solicitation during working time." Yet, when asked if the reposting of

¹⁷ I note General Counsel witness Wright testified that he was instructed during union meetings not to talk to employees during working time. Assuming Moore heard the same instruction, he ignored it. Moore also testified he was aware Respondent posted a solicitation policy at the plant, but did not read it, suggesting he did not feel constrained by Respondent's actions concerning his efforts on behalf of the Union.

Respondent's solicitation policy was sparked by union solicitations, Dingess gave a purposely ambiguous response, stating it was just one of many policies she was looking at during that time period. Despite Dingess' attempt to disguise the obvious, I find Respondent's February 12 posting was a direct result of its employees' union activities. Steinhafel, in fact, admitted he
 5 ordered the posting as a result of complaints he had received concerning the Union's organizing campaign. Finally, given Respondent's background, Dingess and Steinhafel's testimony that the Union was not discussed during a meeting in which Steinhafel decided to discharge Moore for soliciting Maynard's signature on a union card is simply not credible.

10 General Counsel witness South credibly testified, "solicitation is virtually every day. It's all over the plant. It's open." South cited several examples and he testified the solicitation was during working time. R. Adkins, a former lead person, credibly testified she sold knives and Easter eggs at work during working time, and that she would be asked at Easter time because she "would sell every Easter" for her Church. Respondent witness Edwards claimed he stopped
 15 selling honey at Respondent's facility at least 3 years prior to his testimony because former HR Manager Selbe denied his request to post an automobile for sale. Respondent's "Employee Handbook" contains separate sections concerning bulletin board usage and solicitation. The bulletin board section appears at page 21 and states the bulletin boards "are to be used solely by the Company for Company-related postings." I have credited South and R. Adkins over
 20 Edwards and have concluded solicitations continued at Respondent's Huntington facility during work time until the advent of the Union campaign in February 2004. Edward's testified he did not know solicitations were not allowed during work time until he asked to post a personal item for sale. The fact that Respondent enforced its bulletin board rule does not mean it enforced its rule on solicitation, which appears in a separate section of the handbook. Moreover, by
 25 Edwards' admission he would have thought solicitations on work time were allowed unless he had asked that particular question. In other words, other than passing out a 61 page handbook, of which its rule on solicitation was two paragraphs, there was no evidence that Respondent made a generalized effort to enforce its solicitation rule until the advent of the Union. Edwards testified he was not aware of any one being disciplined for soliciting.¹⁸

30 3. Analysis

In *Wright Line*, 251 NLRB 1083, 1089 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *Transportation Management, Inc., v. NLRB*, 462 U.S. 393 (1983), the Board established a framework for deciding cases turning on employer
 35 motivation. To prove that an employee was discharged in violation of Section 8(a)(3), the General Counsel must first persuade, by a preponderance of the evidence, that an employee's protected conduct was a motivating factor in the employer's decision. The elements commonly required to support such a showing are union activity by the employee, employer knowledge of that activity, and antiunion animus on the part of the employer. *Wal-Mart Stores*, 340 NLRB 220, 221 (2003). If the General Counsel is able to make such a showing, the burden of persuasion shifts "to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line*, supra, at 1089.

45
 50 ¹⁸ Respondent's February 12 posting states, "We have received complaints from employees that they are being solicited to sign union cards during work time." Respondent's failure to investigate and discipline those responsible for the alleged solicitations prior to February 12, serves to corroborate the testimony of the General Counsel's witnesses that Respondent's solicitation rule was not being enforced prior to the February 12 posting.

In *Willamete Industries*, 306 NLRB 1010, 1017 (1992), it was stated that:

...an employer violates Section 8(a)(1) when employees are forbidden to discuss unionization, but are free to discuss other subjects unrelated to work, particularly when the prohibition is announced or enforced only in response to specific union activities in an organizational campaign. *Orval Kent Food Co.*, 278 NLRB 402, 407 (1986). Where the record shows that an employer tolerates a wide variety of solicitation activities without imposing discipline on any employee involved, the employer may not legitimately prohibit employees from soliciting signatures to union authorization cards; much less prohibit them from merely talking about the union. *K & M Electronics*, 283 NLRB 279 (1987); *F. Mullens Constructions*, 273 NLRB 1016 (1984).

And, finally, where an employer disparately enforces even a valid rule against solicitation, it violates not only Section 8(a)(1) but Section 8(a)(3) as well. *South Nassau Communities Hospital*, 274 NLRB 1181, 1182 (1985).

Respondent issued an employee handbook, dated January 2002, containing a rule prohibiting verbal solicitations during working time and in working areas. The rule states violation of this policy may result in discipline up to and including discharge. Despite the rule, South credibly testified that "solicitation is virtually every day. It's all over the plant. It's open." South testified he had been solicited for an NCAA basketball tournament pool, candles, cookies, kitchen knives, Easter eggs, and honey during working time. South testified supervisors and lead personnel were in close proximity when this occurred. South testified Selbe, the former human resources manager, encouraged employees to sell tickets to plant open houses, cook outs, and Christmas dinners during working time. Former lead person R. Adkins testified employees engaged in non work related conversations all day at work while they were working. They would also sell things such as candy to other employees. R. Adkins testified she sold Easter eggs and knives to employees while R. Adkins and the employees were working. She testified supervisors were nearby and she sold to supervisors as well as to the human resources department including Selbe. R. Adkins testified the supervisors did not say anything when she sold items to them. Rather, they would ask her at Easter time, "because I would sell every Easter" R. Adkins testified she was not on break when she had these conversations.

Union Organizer Free sent a certified letter to George dated February 6, naming 23 employees as members of the Union's organizing committee. Moore, an employee of over 6 years, with theretofore no record of discipline was included on the list. On February 12, Respondent posted on its bulletin board a no solicitation rule stating, "We have received complaints from employees they are being solicited to sign union cards during work time. Solicitation of union cards is treated as verbal solicitation under this policy. Employees should refrain from soliciting union cards or any other types of solicitation during working time."

On February 20, Maynard filed a written complaint about Moore with Maynard's supervisor. The statement states that Moore repeatedly called Maynard's house, and had repeatedly stopped Maynard in the plant during working hours trying to get him to sign a union card and to attend union meetings. On February 20, Maynard was called into Dingess office, and in George' presence, Dingess typed a statement for Maynard, which he signed. In the statement, Maynard accused Moore of asking him to sign a union card on Thursday, February 19, during work time. The statement reflects that the conversation lasted 2 minutes, that this had happened several times before, and that the last time was either Thursday or Friday of the prior week. Maynard also complained that Moore called him at home every night. Maynard testified he told Dingess he repeatedly asked Moore to leave him alone, but Moore kept on, and he did not want to go to Moore's line anymore.

Moore was called to a meeting on February 23 with Fisher, Dingess, and George. George told Moore an employee came to George twice and accused Moore of trying to get the employee to sign a union card while they were supposed to be working. Moore denied it, stating Moore knew better. Dingess asked Moore if he had anything else to say. Moore said no and again denied the accusation. The management personnel left and returned in about 5 or 10 minutes. When they returned, George said they made some phone calls, went over their options, and it was Moore's word against the other employee's, and they were going to terminate Moore. Moore credibly testified that, prior to his discharge, no one from management ever talked to Moore about soliciting employees at work.

Dingess testified that, after meeting with Moore, then Fisher, George and herself called Steinhafel. Dingess testified they came to a consensus that Moore had not told the truth and had done what Maynard accused him of. Dingess testified it was Steinhafel's decision to terminate Moore. Dingess and Steinhafel testified Moore was not just terminated for violating the no solicitation policy but because he had harassed an employee, kept him from effectively doing his job, and Moore lied about it during the inquiry. Dingess and Steinhafel incredibly claimed they discussed Moore was soliciting union cards, but they did not discuss the Union during the management meeting. Steinhafel denied that Moore was terminated for his support of the Union, or that the solicitation was Union related played a role in the decision.

Steinhafel testified he was involved in Moore's discharge because, "When there's critical decisions that are made with the facility I'm involved in those decisions just as we'll involve legal counsel or others." Steinhafel testified the plant manager has the authority to discharge in routine matters such as attendance, but in non routine matters the plant manager consults Steinhafel. Yet, Respondent treated Moore in a disparate fashion from employee Constance Kruger because Steinhafel testified he was aware of Kruger was terminated for soliciting in 2001, but unlike with Moore, Steinhafel was not involved in Kruger's termination. Kruger's disciplinary report reads "Notice of Termination of Employment". Under the supervisor's section is states, "Soliciting on Company Time", with no further explanation. I place no reliance here on Kruger's alleged termination for solicitation because Respondent placed nothing in evidence concerning Kruger's employment history, or of the specific events leading to her termination.

A more illustrative example of the way Respondent disciplined its employees is the way it treated D. Adkins before he became an open union supporter. D. Adkins became Respondent's full time employee in October 2003 working on the glass line. D. Adkins received a written warning on January 29, for attendance for the period of October to January. Dingess testified about an incident concerning D. Adkins and employee Vance Ward taking place in February. Dingess investigated a complaint by D. Adkins. As a result of her investigation she concluded that D. Adkins was not accurately reporting the event to her. Part of D. Adkins' job was to discard unusable glass in an outside dumpster. Dingess determined D. Adkins was standing away from and throwing glass at the dumpster. Ward asked D. Adkins to stop because the glass was bouncing out of the dumpster and falling around Ward. D. Adkins refused to stop and Ward issued a threat. Dingess spoke to the supervisor, who said she had not documented the problem, but had spoken to D. Adkins a couple of times about not throwing glass. The supervisor said D. Adkins was not getting along with people working in that area. Dingess concluded D. Adkins was working in an unsafe manner and his temper flared when Ward asked him to stop throwing glass. Dingess determined both employees were at fault because Ward should not have threatened D. Adkins. She testified neither employee was formally disciplined for the incident, although each employee was orally reprimanded. Dingess spoke to them about maintaining a harassment free, safe workplace, and not threatening another employee.

I find the General Counsel has established a strong prima facie case under *Wright Line* that Moore's discharge was unlawfully motivated. Respondent had knowledge of Moore's union activity, and Respondent exhibited animus towards employees' union activity. In this regard Respondent's employee handbook states, "The Company believes a union is not necessary and not in the best interest of either the Company or its team members." Respondent acted on this position by unlawfully withholding scheduled wage increases from its employees, and interjecting its unlawful actions in its election campaign against the Union by issuing memos to employees stating the Respondent could implement the increase if the Union was defeated in the election.

I find that Respondent has not met its burden of establishing it would have discharged Moore for soliciting Maynard during working time, absent the fact that Moore was soliciting Maynard to sign a union card. The evidence establishes that despite a no solicitation rule published in its January 2002 employee handbook, Respondent's officials tolerated and participated in solicitation of employees for non-union related matters on company time. Shortly after Respondent became aware of its employees organizational efforts, Respondent reposted its rule concerning solicitation while specifically attributing the posting of the rule to its employees' union activity. While Respondent allowed conversations about a variety of non-related work topics among employees during work time, it summarily discharged Moore, without out warning, for a 2 minute conversation with Maynard, where Moore asked Maynard to sign a union card. While Maynard reported to Respondent's officials that Moore had approached him several times, there was no claim that Moore engaged Maynard in lengthy conversations at work. Steinhafel and Dingess testified that Moore, a long time employee with no prior disciplinary record was discharged without warning because of his solicitation of Maynard's signature of a union card during working time, because he harassed Maynard, and because they thought he lied during his denial of the solicitation allegation.¹⁹ During this same time period, D. Adkins, a short term employee with an attendance discipline on his record, was found through Dingess' investigation to be harassing another employee by throwing glass. Dingess testified D. Adkins ignored his supervisor's requests to stop, and that D. Adkins was not completely truthful in reporting the events to Dingess. Yet, D. Adkins, who was not an open union adherent at the time, received no formal discipline for the incident. The difference in treatment of the two employees is striking. Finally, I do not credit Dingess and Steinhafel's testimony that although Moore was discharged for asking Maynard to sign a union card, that the Union was not discussed during the meeting in which it decided to discharge Moore. Rather, it was the employees' union activities that prompted Respondent to repost its no solicitation rule,²⁰ and I find that Respondent treated Moore in a disparate fashion and discharged him because he was soliciting on behalf of the Union rather than because he violated a no solicitation rule which prior to the advent of the Union had not been enforced. Accordingly, I find Respondent discharged Moore in violation of Section 8(a)(1) and (3) of the Act. See, *Willamete Industries*, supra. at 1017 (1992).

¹⁹ Moore did not engage in any threatening behavior towards Maynard.

²⁰ Dingess and Steinhafel testified about a couple of vague reports of harassment concerning union solicitation that caused Steinhafel to re-post Respondent's solicitation rule in February 2004, shortly after Respondent received written notice of the union campaign. Respondent failed to present any evidence that it bothered to investigate these alleged instances of harassment, and assuming it even occurred, Respondent has not established it constituted "substantial work disruption" of the nature to allow it to begin enforcing a no solicitation rule solely at the advent of a union campaign. See, *City Market, Inc.*, 340 NLRB 1260, fn. 2 (2003); and *NLRB v. Roney Plaza Apartments*, 597 F.2d 1046, 1049 (5th Cir 1979).

D. Respondent discharges employee Dana Adkins

D. Adkins began working at the Huntington plant in May 2003 as a temporary employee and he became Respondent's full time employee in October 2003 working on the glass line. He was discharged on June 11. D. Adkins' supervisors were Shift Supervisor Chad Angel and Line Lead Aaron Holderby. D. Adkins received a written warning on January 29, for attendance for the period of October to January. The warning, listed as progressive discipline, was the first of four possible attendance warning notices.

As set forth above, Dingess credibly testified about an incident concerning D. Adkins in February in which she received a complaint from D. Adkins about a co-worker Vance Ward. Dingess investigated and determined D. Adkins was improperly disposing of unusable glass by standing away from and throwing glass at a dumpster. Ward asked D. Adkins to stop because the glass was bouncing out of the dumpster and falling around Ward. D. Adkins refused to stop and Ward issued a threat. Dingess spoke to the supervisor, who had not documented the problem, but had spoken to D. Adkins a couple of times about not throwing glass. Dingess concluded D. Adkins was working in an unsafe manner and his temper flared when Ward asked him to stop throwing glass. Dingess determined both employees were at fault because Ward should not have threatened D. Adkins. Neither employee was formally disciplined for the incident, although each employee was orally reprimanded. Dingess spoke to them about maintaining a harassment free, safe workplace, and not threatening another employee. Dingess transferred D. Adkins to another location at the same pay.²¹

1. The broken computer screen

Dingess' typewritten notes reveal D. Adkins was involved in an incident where he broke a computer screen on a piece of Respondent's machinery on April 11.²² D. Adkins admitted to breaking the equipment, but claimed it was an accident. D. Adkins testified as follows: D. Adkins was using a frame cleaner machine which chisels and cleans the corner of vinyl frames so they can be sent for production. D. Adkins lost his balance and raised his right hand against the machine's computerized screen to regain it and in doing so he broke the screen. D. Adkins testified the machine had previously been repaired that night, and his frustration with the machine breaking down was a given. However, D. Adkins denied he was angry or swearing after the screen was broken. D. Adkins reported the incident to Angel, who called maintenance. Maintenance technician George Bolen told D. Adkins they could not have people punching the screens. D. Adkins denied punching the screen and explained to Bolen what occurred. D. Adkins testified there were two frame cleaners on the yellow line, so with one machine down the line could still operate.

Respondent called Bolen as a witness.²³ Bolen testified as follows: The evening D. Adkins broke the screen, Bolen arrived to do a requested maintenance on the machine. D. Adkins "was cussing" about the machine making his job hard. D. Adkins did not swear at Bolen. After completing the repair, Bolen began to walk away. Moments after Bolen turned, Bolen heard a sound "like somebody had hit a machine." Bolen turned and saw D. Adkins holding the

²¹ I have credited Dingess' account of this incident. She testified in a detailed fashion, and certain of D. Adkins' admissions served to corroborate her account.

²² The applicable maintenance log states the incident took place on April 12. However, it occurred on the night shift, which would explain the date discrepancies on the two reports.

²³ Bolen had been discharged by Respondent prior to his testimony for a matter unrelated to this proceeding.

broken computer screen. Bolen asked what happened. D. Adkins initial response was he did not know. D. Adkins then said he fell. However, D. Adkins did not appear dirty from the vinyl dust on the floor. Bolen wrote on his repair log dated April 12, "Employee punched computer screen out of machine," although Bolen did not actually see D. Adkins punch the screen. The following morning Bolen and his supervisor met with Dingess. Bolen told Dingess that D. Adkins was upset the machine was not working, Bolen fixed the machine and shortly after Bolen turned away, he heard a pop and saw D. Adkins holding the computer screen. Bolen told Dingess he thought D. Adkins had punched the screen out. Dingess told them not to talk about the case because they were conducting an investigation.²⁴

D. Adkins testified he was called to a meeting with Dingess and Angel and was told he was on suspension concerning the broken screen pending an investigation. D. Adkins testified he told Dingess and Angel that he lost his balance and put the palm of his hand through the screen. D. Adkins testified, and Dingess' notes confirm, that D. Adkins told Dingess he would make restitution for the machine. Dingess and Angel credibly testified Dingess told D. Adkins the investigation was ongoing, and D. Adkins was not to speak to anyone but management about the incident under investigation.²⁵ Angel testified he told D. Adkins that Angel felt D. Adkins had damaged the machine on purpose. Dingess testified she had reached a similar conclusion, although D. Adkins claimed it was an accident. Dingess testified that, during this meeting, D. Adkins was suspended for 4 days pending investigation.

D. Adkins testified they brought him back Friday, April 15, for a meeting with then Plant Manager George, Dingess, and Angel. D. Adkins testified George stated he did not believe D. Adkins and if George had his way he would have discharged D. Adkins, but Dingess and Angel had convinced George otherwise. D. Adkins testified Dingess told him that he needed to make sure to follow the code of conduct and not to curse at anybody, although they did not accuse D. Adkins of cursing at anyone. D. Adkins testified Dingess told D. Adkins that he was on final written warning status. Dingess testified George told D. Adkins it was believed D. Adkins had broken the machine intentionally out of anger. Dingess testified she told D. Adkins that his final written warning status was effective immediately, and that he was going to receive a written copy in addition to his 4 day suspension.²⁶ Dingess testified D. Adkins was again warned not to discuss the issue about the disciplinary action or the events involved in the investigation with anyone outside of management. Dingess testified, although the investigation had been completed, she gave D. Adkins this instruction to prevent conflict on the shop floor.²⁷ In further

²⁴ Dingess testified Bolen told her that Bolen believed D. Adkins broke the machine intentionally because D. Adkins first denied but then admitted breaking it, although he claimed it was an accident.

²⁵ Dingess explained this instruction was important to try to minimize the likelihood of retaliation and to protect the integrity of management's investigation by preventing stories from changing while they were trying to find out what happened. Dingess also testified the instruction was necessary because D. Adkins had already demonstrated he had a temper concerning the glass throwing incident, and he had behaved inappropriately even after his supervisor told him his work was unsafe.

²⁶ I have credited Dingess' testimony over D. Adkins' claim he was under the impression the written warning status only began when he received the document.

²⁷ Angel's testimony varied somewhat from that of Dingess. Angel testified Dingess told D. Adkins how important it was for him not to discuss the investigation with anyone else but management because the investigation was still going on. Angel testified Dingess told D. Adkins if he discussed it with anyone else he could be terminated. D. Adkins testified he was not told he could not talk to anyone about the incident. Rather, he was told he could not

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explanation of her directive, Dingess testified the more it was talked about, the likelihood there would be an issue where somebody would be harassed or there could be a safety issue because it was a significant event that the machine was broken and it was possible other people were impacted by it. Dingess testified she also needed to protect the integrity of the information she received because people could change their story or retract information. Dingess testified,
 5 "So it's a reminder that I generally give in those kinds of situations that have the potential for being volatile. And causing conflict in the work - - you know, on the work floor."

2. D. Adkins' union activity

10 D. Adkins signed a union authorization card on April 13 and began to attend union meetings at that time. Prior to signing the union card, D. Adkins was not open with his union activities. However, thereafter, D. Adkins spoke to other employees about the Union, and he frequently wore pro union shirts and buttons to work. D. Adkins credibly testified both Holderby
 15 and Angel saw D. Adkins with the union buttons and union shirt on. D. Adkins testified he hand billed for the Union in April and May at the plant entrances and was seen by Plant Manager Tim Dragoo, Dingess, Angel, and Holderby. D. Adkins credibly testified he heard Angel say if the Union was voted in, they would be starting from nothing.

20 D. Adkins credibly testified to the following: There were two employee meetings D. Adkins attended in the plant about the Union. The first meeting took place about three weeks before the May 20 election and was conducted by Steinhafel. After playing a video, Steinhafel opened the floor for questions. D. Adkins, who was wearing union paraphernalia, asked Steinhafel if he was saying Respondent was planning on closing the plant if the Union was
 25 elected. Steinhafel responded Respondent had invested a lot of money in the plant. D. Adkins attended another meeting conducted by Steinhafel. Both Steinhafel and Angel spoke at the meeting about union plants in the Huntington area that had closed. There was material in a video that discussed employees being permanently replaced if there was a strike. D. Adkins asked Steinhafel to explain the difference between an economic and a non-economic strike, and
 30 Steinhafel complied. Steinhafel mentioned one of Respondent's union facilities in Wisconsin was shut down for lack of productivity. D. Adkins asked if it was true the employees at the plant were given the option to transfer to another of Respondent's plants and that no employee lost their job. Steinhafel did not respond to the question. D. Adkins asked Steinhafel why Respondent was opposed to a union at the Huntington facility since Respondent had purchased
 35 plants that were already organized. Steinhafel responded Respondent was better qualified to represent its five thousand employees than the Steelworkers Union was to represent a hundred and seventy at the Huntington plant. During these exchanges Angel made throat slashing gestures to cue Steinhafel to stop answering D. Adkins' questions. There were about 25 to 30 employees at the meeting, but D. Adkins was the only one wearing union paraphernalia.²⁸

3. D. Adkins' is discharged

On May 16, D. Adkins attempted to bid for a material handler position. However, Angel told D. Adkins that since he was on a final written warning status he was not eligible to get the
 45 job. D. Adkins told Angel he never received a final written warning. Angel said he would talk to

"tamper with the investigation."

²⁸ I have credited D. Adkins' detailed testimony concerning his union activities. D. Adkins' union card was introduced into evidence, he testified in a detailed and credible manner with
 50 strong recall, and his testimony about the plant meetings was not denied by Respondent's witnesses.

Dingess. Angel returned the following evening and presented D. Adkins with a final written warning. D. Adkins refused to sign the warning because he disagreed with some of its content, including what he believed to be an accusation that he had cursed at a maintenance technician. D. Adkins was shown but not given a copy of the warning. The warning, dated May 17, is signed by Angel and reads "Final Written Warning."²⁹ It states D. Adkins was being placed on Final Written warning for violating conduct and safety rules. The warning states:

On April 11, 2004, you violated our company policy with negligent and careless conduct involving damage to company property. Because of an unsafe and careless act, you significantly damaged a very expensive piece of equipment that will result in down time for repair and costly repair. You admitted to making comments to the welder about a machine that included 'maybe if you break it they will have to get a new one'.³⁰ You violated our code of conduct when you used inappropriate and offensive language while talking with maintenance regarding the machine.

Because of these issues you are being placed on final warning and will receive a 4-day suspension.

D. Adkins testified that upon receiving the written warning, he spoke with Bolen. D. Adkins asked Bolen if D. Adkins had done anything to make him feel uncomfortable or if D. Adkins had cursed at him or made him feel threatened in any way. Bolen asked D. Adkins where this was coming from and Bolen said D. Adkins had never done anything to him to make him feel threatened or uncomfortable.³¹

²⁹ Angel testified he gave D. Adkins the warning the date listed on the warning. Angel testified it is common to issue a written warning late because of the investigation. Angel testified that: D. Adkins approached Angel about 18 to 20 times asking if Angel thought D. Adkins was going to get the material handlers job. Angel told D. Adkins he did not think D. Adkins was qualified to bid for or receive the job because he had been written up. Dingess testified it took about three weeks before Dingess finished the final warning, typed it up and hand delivered it to D. Adkins in writing. She testified the delay was not unusual. I have credited D. Adkins and Angel that it was Angel who tendered the warning to D. Adkins.

³⁰ D. Adkins testified an employee running a frame welder liked to see how far ahead of D. Adkins he could get by backing D. Adkins up with frames. D. Adkins told the employee if he was having problems with the machine, if he rushed and ended up tearing it up, maybe they would get him a new one and he could bury D. Adkins twice as fast.

³¹ I have credited D. Adkins over Bolen as to the timing and content of the above conversation to the extent their testimony differs. Bolen testified D. Adkins approached him around April 17, right after D. Adkins returned from his suspension. Bolen testified D. Adkins approached him, "after we was told not to approach each other about this problem." D. Adkins told Bolen they said he was cursing the maintenance man. Bolen testified, "I told him, no, that he was cussing at the machine. And that we wasn't supposed to be discussing this case until everybody had finished their own investigation and I turned around and walked off." Bolen testified this was the only time D. Adkins talked to him about it. It is more likely, as D. Adkins testified, that he approached Bolen after D. Adkins was shown the written warning, which Angel credibly testified took place on May 17. Bolen's testimony also appears to be designed to advance Respondent's cause, as he testified both he and D. Adkins were told not to approach each other about the incident. Yet, Bolen did not attend any meetings with D. Adkins and would not have known what he was told. Moreover, it is unlikely Bolen would have told D. Adkins they could not talk about the incident until the investigation was complete, since I have concluded this conversation took place over a month after D. Adkins returned from his suspension. I have also concluded, considering the witnesses' demeanor, that D. Adkins testified in a credible

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D. Adkins testified that following Angel's tendering him the written warning; he again discussed his attempted job bid with Angel.³² Angel told D. Adkins to see Dragoo the following morning. The meeting took place with Dingess in attendance.³³ D. Adkins testified as follows:

5 Dragoo told D. Adkins he was disqualified from bidding for a job for approximately six months due to the severity of the incident concerning D. Adkins breaking the computer screen. Dragoo asked D. Adkins when the incident took place. D. Adkins told Dragoo that he could tell him the date by the date D. Adkins signed his union card, which was April 13. D. Adkins asked Dingess who his accuser was concerning the inappropriate language allegation on the final written

10 warning. Dingess said that was not relevant. D. Adkins asked Dingess what he was accused of saying, and she again responded that was not relevant. D. Adkins told Dingess he spoke to the maintenance man he spoke to the night of the machine incident, and D. Adkins was told he had not done what he was accused of in the written warning. Dingess stated D. Adkins had violated a confidentiality agreement not to discuss any of the events of the investigation with anyone

15 outside of management. D. Adkins responded he was not aware of any such agreement. Dingess stated that was considered tampering with the investigation. D. Adkins was then told not to return to work until they could investigate further.

D. Adkins testified he was called back in on a Friday and he told Dingess that he wanted to apply his *Weingarten* rights and have a co-worker with him for their meeting. Dingess complied with D. Adkins' request and employee Vincent Byrd attended the meeting along with D. Adkins, Dingess and Dragoo. D. Adkins testified that, during the meeting, Dingess told D. Adkins they had investigated what they had discussed during the prior meeting, and that D. Adkins was terminated. D. Adkins did not respond.³⁴

a. Respondent's witnesses

Dragoo testified he overheard Angel telling Dingess that D. Adkins had a concern over his eligibility for job bids because of a prior disciplinary action. Dragoo told Angel to have D. Adkins come in the next morning and Dragoo would explain he was not eligible.³⁵ Dragoo, along with Dingess, met D. Adkins as planned. Dingess testified as follows about the meeting: Dragoo asked D. Adkins if he remembered being told he was not eligible to bid as a result of his disciplinary action. D. Adkins said he remembered but stated he did not think it was fair. D. Adkins said he did not agree with the written warning, which D. Adkins said stated he cursed a maintenance employee. D. Adkins said he did not do that, and that he asked the maintenance employee about it because if he had done it he was going to apologize. Dingess said you went out on the floor and talked to people about the incident and the investigation. D. Adkins said yes. Dingess asked if D. Adkins remembered she instructed him not to do that, and he said yes, but he wanted to know what he was being accused of. Dingess asked if D. Adkins

40 remembered being told on several occasions he was not to discuss the event and the

fashion about the conversation, and had a greater cause to remember its timing and content as it directly impacted on his employment status, while Bolen was only peripherally involved.

³² D. Adkins explained he was performing a job above his classification, and he wanted to bid on the job to obtain the title and pay raise since he was already performing the work.

³³ D. Adkins testified he had previously met Dragoo for a brief introductory conversation around May 19, when Dragoo was walking through the plant shortly after Dragoo became plant manager. Dragoo replaced George on May 18, which was 2 days before the union election.

³⁴ The complaint alleges and Respondent admits D. Adkins was discharged on June 11.

³⁵ Dragoo denied knowing who D. Adkins was at that point in time.

investigation, and he said yes, but it was not until 3 weeks later.³⁶ Dingess told Adkins she was suspending him pending and investigation because he violated an instruction Dingess had given him about compromising the investigation. Dragoo testified that, during the meeting, D. Adkins said he had a problem with his temper, and he had gone out and talked to some of the people on the floor to apologize to them for the incident regarding his breaking the computer screen.³⁷ Dragoo testified Dingess asked D. Adkins if he remembered her telling him not to talk about the events that led up to the disciplinary action. D. Adkins said he remembered, but he wanted to find out who the people were he offended and apologize to them.³⁸

Dragoo initially testified D. Adkins was discharged for failure to follow Dingess' instructions not to talk about disciplinary action or events that led up to that disciplinary action with other employees. Dragoo testified that: D. Adkins left and Dragoo and Dingess talked by phone to Tina Check, in corporate personnel in Wisconsin, and reviewed what took place. During the call, the confrontation D. Adkins had with an employee on the glass line causing D. Adkins to be transferred to another department, D. Adkins' breaking screen on the frame cleaner, and his failure to follow the instruction not to talk to employees about the incident were discussed. Dragoo testified Dingess described the frame cleaner incident, and it was Dragoo's understanding they wanted to terminate D. Adkins at that time, but there "wasn't really any witnesses to say that he did that out of anger. So, they just felt kind of uncomfortable with doing that." Dragoo testified they came to the consensus during this meeting that D. Adkins should be terminated, but it was Dragoo's decision to discharge him. Dragoo testified the Union did not come up during the discussion and Dragoo was not aware D. Adkins had been billed, had never seen D. Adkins wearing union paraphernalia, and Dragoo had no reason to affiliate him with the Union. Dragoo testified D. Adkins was terminated because he was an employee for less than one year, and they had already had three disciplinary issues with him. Dragoo testified he would have terminated D. Adkins prior to his violating the rule about talking to the other employees about his discipline, if Dragoo had been the plant manager when D. Adkins broke the computer screen.

Dingess testified Dingess and Dragoo reviewed D. Adkins' file, including the number of incidents he had in a very short period of time of his employment.³⁹ Dragoo asked why he was not fired when he broke the computer screen. Dingess replied the decision was made that he would be given one last opportunity to improve his work behavior and there had not been a witness as to how D. Adkins broke the screen. Dingess testified Dragoo said he wanted to terminate D. Adkins, and Dingess agreed. Dingess denied that the Union or D. Adkins' views on the Union were discussed. Dingess testified the precipitating event leading to D. Adkins' termination was his violating the rule not to talk to other employees about the disciplinary investigation. Dingess explained that in the investigation stage of the computer screen incident,

³⁶ Dingess vacillated in her testimony between 3 weeks and 3 months concerning D. Adkins' response. However, I have concluded it was 3 weeks which more closely approximates the actual timing of the events in question.

³⁷ D. Adkins denied stating he had a problem with his temper.

³⁸ Dragoo testified Dingess' instruction not to talk to other employees about an incident is a common instruction that Respondent used in all its plants. Dragoo testified the reason is to prevent arguments on the floor by preventing people from trying to find out who their accusers are, and then to pick fights on the floor. Dragoo testified he also wanted employees to be able to talk to him or the human resource manager about a problem without being harassed. Dragoo testified he has worked at three other of Respondent's plants as operations manager, and Dingess' instruction was an unwritten policy Respondent followed at those plants.

³⁹ Dingess failed to testify that Check was involved in this conference.

D. Adkins was directed not to discuss that particular situation with other employees, and then at the time the discipline was issued to him when he returned from his suspension he was reminded not to discuss the incident. Dingess testified she instructed D. Adkins three times not to talk to employees other than management about the incident.

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b. Credibility

I found, considering his demeanor, D. Adkins testimony concerning the immediate events leading to his discharge for the most part to be worthy of belief and more credible than that of Respondent's witnesses. D. Adkins testimony reveals that D. Adkins had been repeatedly attempting to bid for a position the tasks of which he was already performing on a temporary basis. On May 16, Angel told him he was blocked from placing the bid because he was on written warning status. However, D. Adkins told Angel that D. Adkins had never received the actual written warning for the event that took place on April 11. Angel consulted with Dingess, and provided D. Adkins with the written warning the next day on May 17. D. Adkins refused to sign the warning because he disagreed with some of its content, including an allegation which he understood to mean that he had cursed at maintenance technician Bolen. The warning prompted D. Adkins to consult with Bolen, asking him if he did anything to make Bolen feel uncomfortable or threatened. As set forth above, I have credited D. Adkins over Bolen over the timing of this conversation and its content. However, Bolen did confirm that D. Adkins informed him the reason for D. Adkins inquiry was that he had been accused by Respondent of cursing at the maintenance man. Bolen testified that he told D. Adkins that he told Respondent he was cursing at the machine, not at Bolen. There was no contention by either witness that D. Adkins was attempting to apologize to Bolen. Rather, D. Adkins was investigating the bona fides of his written warning as he testified. He was doing so, because the warning served as an impediment to his attempt to bid on a job. Thereafter D. Adkins persisted in his efforts to bid on the job, resulting in the first of his two meetings with Dragoo and Dingess.

I do not credit Dragoo's testimony that during his initial meeting with D. Adkins that D. Adkins told Dragoo that D. Adkins had a temper problem, or that he had gone out on the floor to talk to some people to apologize for breaking the computer screen. D. Adkins credibly denied telling Dragoo that D. Adkins had a temper problem. Moreover, he only spoke to one employee about the incident, that was Bolen, and the testimony of D. Adkins as well as Bolen was that the purpose of the conversation was to investigate D. Adkins warning, not to apologize to Bolen. I found Dragoo, considering his demeanor, to be a witness who tended to slant his testimony to place Respondent's position in the best light rather than objectively report what actually transpired. I do credit Dingess' testimony that, during the meeting, she asked D. Adkins if he remembered she instructed him not to discuss the investigation, and he said yes, but he wanted to know what he was being accused of. Dingess testified part of D. Adkins' response was that he did not have the conversation with Bolen until 3 weeks after her admonition. In fact, D. Adkins talked to Bolen around a month after Dingess' investigation had been completed. D. Adkins testified that immediately following his 4 day suspension, during a meeting with George, Dingess, and Angel, that D. Adkins was told he could not tamper with the with investigation. Angel's testimony concerning the meeting corroborated D. Adkins in part. Angel testified Dingess told D. Adkins how important it was for him not to discuss the investigation with anyone else but management because the investigation was still going on. Dingess testified D. Adkins was warned not to discuss the issue about the disciplinary action or the events involved in the investigation with anyone outside of management. Dingess testified the investigation had been completed at the time she issued this instruction. Dingess' instruction was not codified in Respondent's handbook, and the three witnesses came away different meanings of its import, with D. Adkins and Angel understanding that it was premised on Respondent's investigation being ongoing, while Dingess testified the investigation was complete at the time she gave the

directive. Due to the ambiguous nature of the remark, it was reasonable for D. Adkins to conclude he could discuss the incident with others after the investigation was complete. I have therefore credited Dingess' testimony that D. Adkins told her he remembered the instruction but that it was issued three weeks earlier.

I do not credit Dragoo and Dingess' testimony that D. Adkins' union activity was not discussed during the meeting between management officials in which it was decided to terminate his employment. It has been long held that the Board is not required to accept self-serving declarations of a respondent's witnesses. See *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 469 (9th Cir. 1966). D. Adkins credited testimony reveals that he wore union paraphernalia at work in plain view of Angel, and that he hand billed for the Union in plain view of Dragoo, Dingess, and Angel. D. Adkins also served as an advocate for the Union during two meetings at the plant conducted by Respondent's officials. At the time of D. Adkins' discharge Respondent had recently lost a close election to the Union at the Huntington plant. Respondent maintained a Section in its Hourly Employee Handbook, which issued in January 2002, entitled "A WORD ABOUT UNIONS." The section contains the statement, "The Company believes a union is not necessary and not in the best interest of either the Company or its team members." Neither Dingess nor Angel denied knowledge of D. Adkins open pro-union status. Dingess impressed me as a thorough individual. I do not find it credible that she would not have discussed with Dragoo and Check the ramifications legal and otherwise of terminating an open union adherent so close in time to a close and hotly disputed election.⁴⁰

4. Analysis

In *Jeannette Corp. v. NLRB*, 532 F.2d 916 (3rd Cir. 1976), the employer discharged an employee for discussing wages with other employees in violation of a company rule prohibiting employees from discussing wage rates among themselves, and for allegedly misrepresenting that she had received a salary increase. The court refrained from deciding whether the wage discussions at issue constituted protected activity. Nevertheless the court found the rule was invalid and consequently the discharge violated Section 8(a)(1) of the Act. The court stated:

It is sufficient for finding the rule prima facie violative of section 8(a)(1) to note that wage discussion can be protected activity and that an employer's unqualified rule barring such discussions has the tendency to inhibit such activity. C.f. *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21, 23, 85 S. Ct. 171, 172, 13 L.E.d 2d 1, 3 (1964); *N.L.R.B. v. Hudson Transit Lines, Inc.*, 429 F.2d 1223, 1227 (3d Cir. 1970).

Once it is established that the employer's conduct adversely affects employees' protected rights, the burden falls on the employer to demonstrate 'legitimate and substantial business justifications' for his conduct. *NLRB v. Fleetwood Trailer Co., Inc.*, 389 U.S. 375, 378, 88 S.Ct. 543, 545, 19 L.Ed2d 614, 617 (1967); *NLRB v. Jemco, Inc.*, 465 F.2d 1148, 1152, fn. 7 (6th Cir. 1972). Id. at 918.

⁴⁰ I have also credited D. Adkins that he told Dragoo in their initial meeting concerning D. Adkins attempted job bid that D. Adkins incident concerning the computer screen took place around the time D. Adkins signed a union card. D. Adkins openly engaged in union activities at the plant, and he had no reason to conceal his pro-union status from Dragoo. Moreover, D. Adkins credibly testified he invoked the Board's *Weingarten* decision in asking for a witness to attend the meeting in which he was discharged. It is reasonable to presume Respondent's officials would have concluded Union officials advised D. Adkins to make that request.

The court noted the only justification by the employer was that employees spending time talking about salaries was a waste of time, and the rule limits jealousy and strife between employees. However, the court stated a rule prohibiting wage discussions without limitations concerning time and place would also prohibit such discussions during breaks, or after work where the discussions would not adversely impact job performance. The court rejected the employer's other justification that the rule would limit strife and jealousy among employees, because "dissatisfaction due to low wages is the grist on which concerted activity feeds." *Id.* at 919. The court stated:

Since the rule is invalid on its face it cannot be enforced, and McNeely's discharge for violating the rule cannot be sustained. We thus have no occasion to discuss the Company's contention that, entirely apart from the rule, McNeely's wage discussions with fellow employees did not constitute concerted activity within the protection of Section 7 of the Act. *Id.* at 920.⁴¹

In *Caesar's Palace*, 336 NLRB 271, 272 (2001), the Board stated:

We agree with the judge that employees have a Section 7 right to discuss discipline or disciplinary investigations involving fellow employees. We also agree that the Respondent's rule prohibiting discussion of the ongoing drug investigation adversely affected employees' exercise of that right. It does not follow however that the Respondent's rule is unlawful and cannot be enforced. The issue is whether the interests of the Respondent's employees in discussing this aspect of their terms and conditions of employment outweigh the Respondent's asserted legitimate and substantial business justifications. *Jeannette Corp. v. NLRB*, 532 F.2d 916 (3d Cir. 1976).

* * *

Here, the Respondent imposed a confidentiality rule during an investigation of alleged illegal drug activity in the work place. Because the investigation involved allegations of a management cover up and possible management retaliation, as well as threats of violence, the Respondent's investigating officials sought to impose a confidentiality rule to ensure that witnesses were not put in danger, that evidence was not destroyed, and that testimony was not fabricated. We find that the Respondent has established a substantial and legitimate business justification for its rule and that, in the circumstances of this case, this justification outweighs the rule's infringement on employees' rights.

In *Phoenix Transit System*, 337 NLRB 510, *enfd.* 63 Fed Appx. 524 (DC. Cir. 2003) (non published.), the Board found the employer violated Section 8(a)(1) of the Act by maintaining a confidentiality rule prohibiting employees from discussing their sexual harassment complaints among themselves. The Board noted the investigation of the alleged harassment ended well before the events at issue and the rule prohibited discussion even among the affected employees who the respondent originally assembled as a group to solicit information. The Board found the respondent failed to provide a sufficient justification for maintaining its rule.⁴² See also, *Westside Community Mental Health Center*, 327 NLRB 661, 666 (1999), where an

⁴¹ See also, *Medeco Sec. Locks, Inc. v. NLRB*, 142 F.3d 733, 746, fn. 3 (4th Cir. 1998).

⁴² The Board in *Phoenix* distinguished *Caesar's Palace*, *supra.*, stating the rule there was maintained during an ongoing investigation of alleged illegal drug activity, where confidentiality directive was given to each employee who was separately interviewed, the investigation involved allegations of a management cover-up, possible management retaliation, as well as threats of violence, and the rule was intended to ensure that witnesses were not put in danger, evidence was not destroyed and testimony was not fabricated.

instruction not to discuss an employee's suspension with anyone was found to violate the Act, noting in particular it restricted employees from possibly obtaining information from their coworkers which might be used in their defense; *Mobil Oil Exploration & Producing, U.S.*, 325 NLRB 176, 178-179 (1997), enfd. 200 F.3d 230 (5th Cir. 1999), where an employee's discharge for failing to follow instructions to keep an ongoing investigation confidential was found to violate the Act; and *All American Gourmet*, 292 NLRB 1111, 1130 (1989), where a rule which would prohibit an employee's discussion of sexual harassment with other employees was found to be impermissibly broad.

I find Respondent discharged D. Adkins in violation Section 8(a)(1) of the Act for an overly broad rule prohibiting employees from discussing disciplinary action taken against them with their co-workers. I find the rule by its terms impinged on employee Section 7 rights. See, *Jeannette Corp. v. NLRB*, *supra*; *Caesar's Palace*, *supra*; *Medeco Sec. Locks, Inc. v. NLRB*; *Phoenix Transit System*, *supra*; *Westside Community Mental Health Center*, *supra*; *Mobil Oil Exploration & Producing*, *supra*; and *All American Gourmet*, *supra*.

I find Respondent has not provided sufficient business justification to enforce the rule against D. Adkins. Dragoo testified it was his decision to discharge D. Adkins. He testified Dingess' instruction not to talk to other employees about a disciplinary incident is a common instruction Respondent used in all its plants. Dragoo testified the reason is to prevent arguments on the floor by preventing employees from picking fights with their accusers on the plant floor. Dragoo testified he also wanted employees to be able to talk to him or the human resource manager about a problem without being harassed. Dingess testified she issued the instruction to try to minimize the likelihood of retaliation and to protect the integrity of management's investigation by preventing stories from changing while they were trying to find out what happened. Dingess also testified the instruction was incident specific because D. Adkins had demonstrated he had a temper concerning the glass throwing incident, and he had behaved inappropriately even after his supervisor told him his work was unsafe concerning that incident. She testified she reiterated the instruction to D. Adkins after the investigation was completed to prevent conflict on the shop floor. Dingess testified she also needed to protect the integrity of the information she received because people could change their story.

I do not find Respondent established a sufficient business justification concerning its instructions to D. Adkins to outweigh the impingement of that instruction on employees' Section 7 rights. Dingess issued a verbal instruction that was not codified in Respondent's handbook. It was ambiguous in that it could have been interpreted to only apply while Respondent was investigating the incident leading to D. Adkins' 4 day suspension. Yet, Dingess applied the rule to D. Adkins as a justification for his discharge over a month after the investigation was completed. Therefore the rule was not enforced in order to protect the sanctity of an on going investigation. Any claim of concern that a witness could change their statement from the one they had provided during the investigation could have been eliminated by taking a signed statement from the witness during the investigation.⁴³ As to Dingess' purported concerns particular to D. Adkins, I note that it was D. Adkins who reported the glass throwing incident to her to prevent it from escalating further. Concerning D. Adkins breaking the computer screen, Dragoo and Dingess' testimony reveals Respondent had concluded it did not have sufficient basis to establish that it was intentional. Respondent's written warning to D. Adkins confirms this conclusion by stating he engaged in "negligent and careless conduct involving damage to

⁴³ In fact, Dingess had already applied this practice as she solicited two signed statements from an employee witness before deciding to discharge Moore, an event that took place prior to D. Adkins' discharge.

company property.” In fact, Dingess notes confirm that D. Adkins offered to compensate Respondent for the broken machinery. I also note that neither Dingess nor Angel were so concerned by the incident as to promptly memorialize it with a written warning to D. Adkins. It was only after D. Adkins persistent efforts to bid for a job that Angel and Dingess found it necessary to issue the warning a month after the event.

In sum, Dragoo, whose decision it was to discharge D. Adkins, failed to testify that the enforcement of the rule was a necessary based on events peculiar to D. Adkins. Rather, he testified the policy was one that had been applied generically at Respondent’s plants to prevent strife on the work floor. I do not find this sufficient basis to impinge on D. Adkins’ Section 7 rights, particularly here where D. Adkins thought his written warning contained an unjust allegation, the warning was being used by Respondent to prevent him from bidding for a job, and he was seeking information from his co-worker that might be used in his defense. See, *Westside Community Mental Health Center*, supra at 666. Since I find D. Adkins was discharged pursuant to an unlawful rule the discharge as a result of the enforcement of that rule is violative of Section 8(a)(1) of the Act, and courts have held it is unnecessary to decide whether D. Adkins was engaged in protected concerted activity. *Jeannette Corp. v. NLRB*, supra; and *Medeco Sec. Locks, Inc. v. NLRB*, supra.⁴⁴

⁴⁴ However, I find D. Adkins was engaged in protected concerted activity when he discussed his discipline with Bolen. In *Phoenix Transit System*, supra at 513, it was noted that the Board has recognized “as enjoined by the Supreme Court, the great importance of employees’ freedom of communication to the free exercise of organizational rights.” It was also noted therein that this freedom of communication applied to non-organizational protected activities. Here, D. Adkins approached Bolen as a potential witness concerning D. Adkins belief that he had been wrongfully accused of certain conduct by Respondent in a written warning. Bolen provided D. Adkins with information which seemed to confirm those beliefs, and D. Adkins cited that response to Respondent in his efforts to bid for a sought after position. In *Jeanette Corporation*, 217 NLRB 650, 657 (1975), enfd. 532 F.2d 916 (3rd Cir. 1976) it was noted quoting the court’s decision in *Mushroom Transportation Company, Inc., v. NLRB*, 330 F.2d 683, 685 (3rd Cir. 1964) that “preliminary discussions are (not) disqualified as concerted activities merely because they have not resulted in organized action or in positive steps toward presenting demands.” It was noted in *Jeanette* that almost any type of concerted activity for mutual aid and protection must start with some type of communication between individuals. Here, D. Adkins approached Bolen to seek his support concerning D. Adkins concern that he had been unfairly disciplined. D. Adkins used information Bolen provided to plead D. Adkins’ case to Respondent. Whether Bolen wanted to further cooperate with D. Adkins’ entreaty is not determinative of whether D. Adkins approach to him was protected by the Act. Particularly here where further cooperation by Bolen was prohibited by Respondent’s unlawful rule, as Bolen testified. Since I find that D. Adkins was discharged pursuant to Respondent’s unlawful rule, a motivation analysis under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1992) is not normally required. See *Phoenix Transit System*, supra. However, the General Counsel also contends D. Adkins was discharged because of his union activity. I have concluded the motivating factor behind the discharge was the enforcement of Respondent’s unlawful rule, not D. Adkins’ union activity. The General Counsel has established Respondent’s animus towards employees’ union activity by its withholding of wages increases while blaming the union for doing so during the election campaign, and its enforcement of its no solicitation rule in a disparate manner resulting in Moore’s discharge. The General Counsel has also established knowledge of D. Adkins’ union activity on the part of Respondents officials, sufficient to create a prima facie case under *Wright Line*. However, Dingess informed D. Adkins that he was not to discuss his discipline with his co-workers prior to

Continued

E. Respondent discharges supervisor Ruth Adkins

Ruth Adkins (R. Adkins) worked for Respondent for over 6 years. She was fired on June 25. At the time of her discharge, she had been a lead person for about 2 years, and as such she was determined to be a statutory supervisor in a unit determination decision issued on April 21 arising out of the Union's petition for election. R. Adkins was a witness on April 6, for the Union in that proceeding. R. Adkins testified as soon as the Board determined lead persons were supervisors, former Plant Manager George held a meeting and told them they could no longer participate in the union campaign. George told them if an employee asked about the Union, they should speak against it. R. Adkins chose instead to walk away if an employee mentioned the Union.

Respondent filed objections to the May 20, election, with one of the issues being the role lead persons played in supporting the Union. R. Adkins testified around early June, R. Adkins met with Dingess and Dragoo where they raised questions concerning R. Adkins' involvement in the union campaign. They asked who R. Adkins associated with, and she told them Chad Edwards, and individuals with the first names of Barry, Cheryl, and Michael. They asked what R. Adkins talked about with these people and she said casual conversation. R. Adkins testified Heather Daniels name also came up concerning conversations about how Daniels obtained her position on the Demand Flow Technology team. R. Adkins testified Dingess and Dragoo asked R. Adkins if Respondent should have a union and she said yes because they were at will employees. Dragoo said if a union came in they would still be at will employees.

Respondent and the Union subpoenaed R. Adkins to testify at the Board's June 22 and 23 hearing concerning Respondent's objections to the election. The Respondent tendered R. Adkins a letter dated June 17, signed by Dragoo, along with her subpoena. The letter states, "Failure to appear and testify truthfully may result in termination." R. Adkins testified she asked Dragoo if she told the truth would she get fired. Dragoo told her to talk to Respondent's counsel Grant Pecor the next day as Dragoo could not tell her anything. Respondent paid her an additional \$40 for testifying at the hearing.

R. Adkins met Pecor on June 21 in a conference room at Respondent's facility. She testified Pecor told her he would be her attorney. R. Adkins asked if he was her attorney or Respondent's attorney. Pecor said he was there to represent her because she was a supervisor. She testified Pecor gave her no assurances about her testimony, or a choice as to whether to testify. Pecor asked R. Adkins about two other lead persons, Chad Edwards and Henry Withrow concerning their involvement with the union campaign. R. Adkins testified Pecor also asked her about her involvement with the Union. She testified she told Pecor that she did not talk about the Union and when employees asked her how she felt about it, she replied it was her business and no one else's. She told Pecor that she did not hand out union cards to any employees except to her son, James Adkins who worked at the plant. R. Adkins told Pecor that James Adkins did not sign the card, but returned it to R. Adkins. R. Adkins told Pecor she did not influence James Adkins on how he should vote. R. Adkins told Pecor employees probably knew how she felt about the union because she was very active during the prior campaign for the Carpenter's Union, but she did not participate in the Steelworkers campaign because she had received custody of her six grand children. She testified when she met with Pecor on June

the Respondent's knowledge of D. Adkins' union activity, and it is clear from the sequence of events that D. Adkins discussing his discipline with Bolen was the precipitating event leading to his discharge.

21, he did not take notes, and he did not have a typewriter with him.

1. Testimony at the hearing on objections on June 22 and 23

5 R. Adkins was called as a witness by Pecor on June 22, at the hearing on objections. The applicable transcripts of that proceeding were entered into evidence as Respondent's Exhibit 33. They reveal R. Adkins, during the course of her testimony, stated: R. Adkins was not a member of the Union's organizing committee as she had taken in six grandchildren a year earlier, and it consumed most of her time. R. Adkins supported the Union in the election
10 campaign until she was told she could not. When asked what she did to support the Union, R. Adkins testified she spoke to her son, who was eligible to vote. When other employees brought the Union up with her, she told them that they were at will employees, and if anything went wrong there was nothing anyone could do. R. Adkins stated if the Union came in the Union could negotiate their at will status. R. Adkins denied discussing benefits with employees. R.
15 Adkins testified after the union campaign started her line consisted of temporary employees and she never told permanent employees she supported the Union. She testified they knew how she felt because she supported a union in a prior election campaign. R. Adkins did not wear a union button or a union t-shirt. She did not attend union meetings, or initiate conversations with employees about the Union. R. Adkins testified after she learned lead personnel were
20 supervisors she told employees they could not talk about the Union in front of her and she would walk off.

The objections hearing transcript reveals Dingess testified on June 23 that she heard R. Adkins testimony, and that R. Adkins' testimony was not consistent with statements R. Adkins
25 had previously made to Dingess. Dingess testified R. Adkins told Dingess that she had spoken to a number of people about the Union, and that R. Adkins had given Dingus a list of several people in the plant who R. Adkins had told it was in their interest to participate in the campaign and be pro-union. Dingess testified R. Adkins said she discussed with them employment at will, that there would be an opportunity for better benefits, and that favoritism could be addressed in
30 a positive way if the Union came into the plant. However, Dingess then testified when asked what R. Adkins said the Union could do for people, "she had said that she had just discussed employment at will. And that that was one specific topic she had discussed with them."

Respondent witness Heather Daniels testified at the objections proceeding on June
35 23.⁴⁵ Daniels was an assembler employed by Respondent at the time of her testimony. Daniels testified that in March, she was approached by R. Adkins about the Union. Daniels testified R. Adkins "had asked me if I was for or against the union. And asked me if I'd signed one of the cards, that they needed signed to get people to where they could bring the union in to where they could do a vote." When asked if R. Adkins said anything about benefits, Daniels
40 testified, "I guess she (said) that the benefits, that they could be better, if you helped fill in on a position to help someone if they weren't there, they would have to pay you for that job, if the job she was doing was more pay, they would have to pay you that. And that they would just do a whole lot better in the plant." Daniels testified R. Adkins told her if the Union came in they could not fire you without a good cause. Daniels testified R. Adkins spoke to her about the Union
45 while Daniels was on the Demand Flow Technology team attempting to improve the work flow of R. Adkins line. Daniels testified they were standing there talking about everything and anything and R. Adkins brought the Union up. Daniels testified R. Adkins told her she thought some supervisors favored certain employees by allowing them to do certain jobs and take extra smoke breaks. Daniels testified R. Adkins said if the Union came in none of that would happen.
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⁴⁵ Daniels was not called as a witness at the current unfair labor practice proceeding.

Daniels then testified R. Adkins said she supported the Union because they would bring better pay and benefits in. Daniels testified Daniels was not for the Union.

R. Adkins was called as a witness by the Union on June 23. R. Adkins testified it was Daniels who approached R. Adkins about the Union. R. Adkins testified Daniels was angry one day concerning the manner in which she obtained her position. Daniels told R. Adkins she was tired of hearing about the Union all of the time. R. Adkins testified she did not ask Daniels her opinion about the Union. Rather, R. Adkins told her whatever you feel is your decision. R. Adkins testified she did not mention at will or favoritism to Daniels.

R. Adkins testified, on June 23, that prior to the objections hearing R. Adkins spoke to Dingess about the Union with Dragoo present. R. Adkins testified she was asked about her involvement in the Union. She testified she did not say anything to them that was different than what she had testified to at the hearing. R. Adkins denied under Respondent's questioning telling Dingess that she solicited cards from Cheryl Harbor, Heather Daniels, or Barry Gaskins. R. Adkins denied telling Dingess that R. Adkins talked to employees and told them the Union would address favoritism in the plant. She testified she told Dingess that she told employees that they are at will employees, and she had called lawyers and when things come up against the employees nothing could be done.

R. Adkins also testified on June 23 that she spoke to Pecor on June 21, and told him everything she testified to at the objections hearing. R. Adkins testified Pecor told her that she solicited cards, which she told him was not true. R. Adkins testified she told Pecor she obtained one card for her son James Adkins. R. Adkins testified she told Pecor she did not tell employees she endorsed the Union. R. Adkins testified she did not tell Pecor she approached several employees about the Union. Rather, she testified Pecor told her she approached employees. R. Adkins testified Pecor told her that she said the Union was needed to address favoritism at the plant and R. Adkins denied it. She denied telling Pecor that she told employees that the Union would get them just cause and stop favoritism. R. Adkins denied telling Pecor that she told many employees that she was for the Union. R. Adkins testified she spoke to employees about favoritism at the plant but not in relationship to the Union. R. Adkins testified it was no secret that she was seeking employment elsewhere and had an interview the afternoon of June 23.

2. R. Adkins is discharged following her testimony at the hearing on objections

R. Adkins testified at the unfair labor practice hearing that when she testified at the objections hearing she did not say anything differently than what she told Dragoo, Dingess, or Pecor prior to her testimony. R. Adkins testified, "I attended no union meetings, I handed out no literature, I wore no badge, no tee shirt, no nothing. That's what I told you all." R. Adkins denied ever lying under oath. R. Adkins testified she thought she was going to be fired at the end of the day following her testimony on June 22. R. Adkins explained, "Because I told the truth. And what I've been trying to tell you all. And it seemed like when I tried to tell you what I did and what I didn't do, you all were trying to add on things that I didn't do." R. Adkins went to the emergency room on the evening of June 22 because of numbness in her right shoulder, arm, and hand. R. Adkins thought her carpal tunnel syndrome might have been returning. R. Adkins filed a workmen's comp claim for that injury that night at the hospital. R. Adkins testified her arm had been bothering her for months that year. However, her arm was worse the day of the hearing from sitting all day. R. Adkins had a job interview on June 23. R. Adkins called in sick on June 24, and the reason she gave was a sore arm.

R. Adkins testified when she returned to work on June 25, Dingess called her into a

meeting and told R. Adkins she was terminated. R. Adkins asked Dingess why she took all day to decide to fire R. Adkins. Dingess said she had to get everything in order. Dingess told R. Adkins she was terminated because Dingess had given her ample opportunity to tell the truth at the Labor Board hearing and R. Adkins kept "telling the untruth." R. Adkins denied she lied. R. Adkins testified Dingess told her she was discharged because when she testified R. Adkins did not stick to the things she informed Respondent's officials of before R. Adkins testified.

3. Respondent's witnesses

Dingess testified at the unfair labor practice hearing that, during their meeting, R. Adkins told Dingess that R. Adkins never went to any union meetings. R. Adkins stated she only participated in the union campaign until the hearing on the supervisory status of lead personnel. Dingess testified R. Adkins told her she worked with Michael Maack, Chad Edwards and Chuck Keiper to solicit cards. Dingess testified R. Adkins said she had gotten cards signed from Cheryl Harbour, Heather Daniels, Barry Gaskins and James Adkins. Dingess testified R. Adkins said she believed we needed a union because there was favoritism in the plant, that they were at will employees and that they did not really have any control over what happened at the plant. Dingess testified R. Adkins said different employees had approached her and she talked to them about the Union before she was told she was not allowed to.⁴⁶ Dingess testified that after she gathered this information she discussed it with Pecor and gave him her notes.⁴⁷ Pecor met with R. Adkins. Dingess asked Pecor if the conversation he had with R. Adkins was consistent with what was contained in Dingess' notes and Pecor said it was.

Dingess attended the hearing on objections. Dingess testified R. Adkins' testified there that she did not have cards signed by certain employees, although R. Adkins had specifically named these employees as having given R. Adkins signed cards when Dingess had previously met with R. Adkins. Dingess testified this was the only thing she could recall where R. Adkins' testimony at the objections hearing was inconsistent with what she had informed Dingess prior to the hearing.

Dingess testified R. Adkins was terminated because, "we didn't trust her anymore." Dingess explained the information R. Adkins gave at the meeting in preparation for Respondent's election objections was contrary to what R. Adkins testified to at the NLRB hearing on objections. Dingess testified she also lost trust in R. Adkins because Dingess learned within a day or two of R. Adkins' discharge that R. Adkins was seeking employment elsewhere and she was going on a job interview. However, Dingess testified, "the main issue" was the information R. Adkins provided Respondent about the role of lead personnel in the Union campaign.

⁴⁶ Dragoo testified, during this meeting, R. Adkins said she solicited and received cards from employees Daniels, Adkins, Harbour and Gaskins. He testified R. Adkins stated she always wanted a Union because Respondent would no longer be an at will company and it would cut out all the favoritism. Dragoo testified Respondent relied on the information R. Adkins provided in that it decided to use her as a witness while dropping some other witnesses.

⁴⁷ Dingess handwritten notes concerning her meeting with R. Adkins read:

Never went to one meeting. Only participated at trial. Michael Mack, Chad Edwards, Chuck Keiper, Chad asked if I would be for the union. I told him I was for it. I would take the papers but I'm not allowed.

Cards, James Adkins, Cheryl Harbour, Heather Daniels, Barry Gaskins, ask they wanted. Sign card Then Chad Chuck Favoritism, at will employee right now without control no discussion after I told we couldn't talk about it.

Dragoo testified he made the decision to discharge R. Adkins after consulting with Dingess and Check. Dragoo testified R. Adkins was terminated for interfering with the company's preparations for the hearing on the objections. It was only after a leading question that Dragoo added that R. Adkins seeking other employment came up as part of an overall factor in the discharge decision. However, contrary to Dingess, Dragoo testified he knew R. Adkins was seeking other employment around a month or two before her discharge, and he learned about it during his meeting with Dingess and R. Adkins to obtain evidence for the filing of objections. Dragoo did not attend the objections hearing, but Dingess informed him that R. Adkins testimony at the hearing was contradictory to the pre-hearing information she had provided Respondent. Dragoo testified he terminated R. Adkins because he could not trust her, "based on the testimony that she gave at the hearing on objections and the information she gave Respondent prior to the hearing." Dragoo testified other factors were Dingess was always looking for a job and her union participation in that she said she would always want a Union when she met with Dingess and Dragoo.

Pecor represented Respondent during objections and unfair labor practice proceedings. Pecor testified, during the unfair labor practice trial, that he interviewed R. Adkins on June 1 and June 21, 2004, regarding the role of lead personnel in the union campaign. The first meeting was to collect evidence to file in support of Respondent's election objections. The second meeting was to prepare R. Adkins to testify at the objections proceeding. Pecor testified that, as of the June 1 meeting, R. Adkins had previously met Dragoo and Dingess and provided them with information. Pecor testified his meeting with R. Adkins was to confirm the information she provided to Dragoo and Dingess was consistent with what she would tell to Pecor. Pecor testified he asked R. Adkins to confirm the activities she had engaged in supporting the Union. Whether she had solicited cards and who she had approached. Pecor testified they talked about why she felt the Union was necessary and the types of things she had told other people. Pecor testified he specifically asked her the names Heather Daniels, Cheryl Harbour, Barry Gaskins, and James Adkins, as they were individuals she had informed Dingess and Dragoo she had approached about the Union. Pecor testified R. Adkins stated she had been approached by Chad Edwards to be a member of the organizing committee and to come to meetings. Pecor testified R. Adkins stated she had helped Michael Maack and Chuck Keiper with their card solicitation. Pecor testified the names he listed in his testimony were names R. Adkins confirmed to Pecor that she had told Dingess the week before. However, after he gave this detailed testimony concerning the June 1, meeting, Pecor was shown an affidavit he had given to the Region dated September 13. The affidavit contains the following statement regarding Pecor's initial meeting with R. Adkins:

At the time I did not ask her for the names of employees that she had spoken to. At this point it was a very quick meeting because I was just trying to provide some evidence to the Board to support the Employer's objections.

Pecor explained the discrepancy in his affidavit and testimony at the hearing as follows:

Q Noting the statement that says at the time I did not ask her the names of employees that she had spoken to. Is that the truth?

A What I asked her - I didn't ask her the specific names, your are correct, I asked her if she had provided Ms. Dingess and Mr. Dragoo with the names of individuals she had solicited cards from, or had worked with the Union and if the information she supplied Ms. Dingess and Mr. Dragoo was correct.

Q You just testified, Mr. Pecor, that she did supply you with the names of those employees.

A Well, by reference to her conversations with Mr. Dragoo and Ms. Dingess.

Q But your statement is incorrect then?

A Well, technically, yes.

5 Pecor testified he took contemporaneous notes on a laptop during his June 21 meeting with R. Adkins. Question 12 in the notes reads, "Did you ever approach individuals to get them to sign a union card?" The response in the notes was "My son and a couple of others, but not many." However, Pecor again testified R. Adkins gave him names of employees but he did not place them in his notes, because he had the names memorized for the hearing the next day.
10 Yet, he testified he was typing the notes as he was talking to R. Adkins. Pecor then testified that when he asked R. Adkins the question during the meeting, her answer was, "that she had approached several individuals in the plant, not a lot compared to others." Pecor denied telling Adkins he needed her to support Respondent's position. Pecor testified he told R. Adkins to tell the truth, and he denied telling her what to say. Pecor testified, "I cannot say if Ms. Adkins lied to me then or lied at the hearing. All I can say is that her testimony at the hearing was not
15 consistent with what she had told me or Ms. Dingess previously." Pecor testified he did not ask R. Adkins for a sworn statement in advance of the objections hearing because she had theretofore been a cooperative witness.

20 4. Analysis

Section 8(a)(4) of the Act reads:

25 It shall be an unfair labor practice for an employer to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

However, the Board has found supervisors can be protected under Section 8(a)(4) of the Act. See, *Beverly California Corp.*, 326 NLRB 153, 202 (1998); *St. Jude Industrial Park*, 265 NLRB 597, 600-601 (1982); *General Services*, 229 NLRB 940 (1977), enf. denied 575 F.2d 298 (5th Cir. 1978); *Hi-Craft Clothing Co.*, 251 NLRB 1310 (1980) enf. denied 660 F.2d 910 (3d Cir. 1981); and *General Nutrition Center*, 221 NLRB 850, 858 (1975). In *Hi-Craft Clothing Company*, supra., the Board found a Section 8(a)(4) violation when an employer discharged a supervisor for threatening to go the "Labor Board" concerning a pay dispute. The Board held
35 supervisors should be protected when invoking or seeking to invoke the Board's processes. The Third Circuit in refusing to enforce the Board's decision distinguished the case from the situation where a supervisor is discharged for seeking the Board's assistance for himself and where a supervisor testifies adversely to the employer's interest. The court noted that employee rights are affected in the latter situation citing with approval *Oil City Brass Works v. NLRB*, 357 F.2d 466 (5th Cir 1966), enforcing 147 NLRB 627 (1964), where the fifth circuit enforced the Board's finding that the discharge of a supervisor who had testified adversely to the employer at a hearing violated Section 8(a)(1) of the Act. Similarly, in *St. Jude Industrial Park*, supra., at 600-601, jurisdiction was asserted under Section 8(a)(4) of the Act to determine whether a supervisor had been unlawfully discharged because of his attendance at a representation
40 hearing with the purpose of testifying against the employer's interest. In *Orkin Exterminating Co.*, 270 NLRB 404, 404, fn. 1 (1984), the Board determined a supervisor had been unlawfully constructively discharged under Section 8(a)(1) of the Act when he reported to his superiors that he planned to testify before the Board on behalf of an employee the employer had discharged.⁴⁸

50 ⁴⁸ The Board in *Orkin Exterminating Co.*, supra at 404, fn. 1, concluded it was not necessary to reach the Section 8(a)(4) allegation since it found the employer's conduct independently

In *Glover Bottled Gas Corp.*, 275 NLRB 658, 658, fn. 7 (1985), enfd. 801 F.2d 391 (2nd Cir. 1986), cert. denied 479 U.S. 1085 (1987), the Board approved the judge's findings that the respondent unlawfully discharged supervisors Gilner and Burke, one for her anticipated testimony, and the other because of her testimony at a Board proceeding. The Board noted it was not necessary to reach the Section 8(a)(4) allegation since the discharges were independently violative of Section 8(a)(1) of the Act. Thus, under established Board and court precedent it is an unfair labor practice to discharge a supervisor because they have or plan to testify in Board proceedings adversely to an employer's interest where the testimony impacts on employee Section 7 rights.

In *Glover Bottled Gas Corp.*, supra., at 673-674 (1985), the following principles were set forth to assess a respondent's defense that the supervisors had "willfully lied" to respondent's counsel and/or lied on the stand in justification of the supervisors' discharge:

In *Big Three Industrial Gas Co.*, 212 NLRB 800 (1974), enfd. 512 F.2d 1404 (5th Cir. 1975), the Board found that an employee's discharge violated the Act even though that employee testified falsely in certain respects at a Board hearing. The Board affirmed an administrative law judge's decision which stated, in pertinent part. (Id. at 803):

[T]he case ... compel a construction of Section 8(a)(4) which would place the burden on the employer to show affirmatively not only that the testimony was false, but also that it was willingly and knowingly false, that it was uttered with intent to deceive, and that it related to a substantial issue. In effect, the employer would have the burden of establishing perjury.⁴⁹

I found R. Adkins to be a credible witness, as she testified in a straight forward and direct fashion. Moreover, her testimony as to her union activities and what she told Respondent's officials about those activities was consistent during the objections and unfair labor practice proceedings.⁵⁰ R. Adkins credibly testified at the unfair labor practice proceeding that she met with Dingess and Dragoo in early June, and questions were raised concerning R. Adkins involvement in the union campaign. They asked who R. Adkins associated with, and she told them Chad Edwards, and individuals with the first names of Barry, Cheryl, and Michael. They asked what R. Adkins talked about with these individuals and she said casual conversation. R. Adkins testified Heather Daniels name came up concerning conversations about how Daniels obtained her position on the Demand Flow Technology team. R. Adkins

violated Section 8(a)(1) of the Act citing *Better Monkey Grip Co.*, 115 NLRB 1170 (1956), enfd. 243 F.2d 836 (5th Cir. 1957); *Oil City Brass Works*, 147 NLRB 627 (1964), enfd. 357 F.2d 466 (5th Cir. 1966); and *HH. Robertson Co.*, 263 NLRB 1344 (1982).

⁴⁹ See also *Superior Protection, Inc.*, 339 NLRB 954, 954, fn. 4 (2003).

⁵⁰ Respondent attempted to impeach R. Adkins at the unfair labor practice proceeding based on an alleged inconsistency between the testimony R. Adkins provided in an affidavit she signed on March 25, 2003, and the testimony R. Adkins gave at a workmen's comp proceeding on April 6, 2005, concerning the ability of an injured employee to perform a certain job. Admittedly, the alleged discrepancy played no role in Respondent's decision to discharge R. Adkins, as it did not occur until almost a year after her termination. Respondent is attempting to impeach R. Adkins' straight forward and credible testimony at the unfair labor practice trial concerning the events leading to her discharge based on testimony in an unrelated proceeding which is clearly a collateral matter. I do not find Respondent's argument persuasive or otherwise serving to undercut R. Adkins' credible testimony herein. See, *Tomatek, Inc.*, 333 NLRB 1350, 1362, fn. 36 (2001); and *New York Sheet Metal Works, Inc.*, 243 NLRB 967, fn. 3 (1979).

testified Dingess and Dragoo asked R. Adkins if Respondent should have a union and she said yes because they were all at will employees. R. Adkins testified that, during their meeting on June 21, Pecor asked her about her involvement with the Union. She testified she told Pecor that she did not talk about the Union and when employees asked her how she felt about it, she
 5 replied it was her business. She told Pecor that she did not hand out union cards to any employees except to her son, James Adkins. R. Adkins told Pecor that James Adkins returned the card to R. Adkins unsigned. R. Adkins told Pecor employees probably knew how she felt about the union because she was very active during the prior campaign for the Carpenter's Union, but she did not participate in the Steelworkers campaign because she had just received
 10 custody of her six grand children. She testified when she met Pecor on June 21, he did not take notes, and he did not have a typewriter with him.

R. Adkins testified on June 22, at the hearing on objections, that she was not a member of the Union's organizing committee as she had taken in six grandchildren a year earlier, and it
 15 consumed most of her time. She testified she supported the Union in the election campaign until she was told she could not. She testified when asked what she did to support the Union, R. Adkins testified she spoke to her son, who was eligible to vote. R. Adkins testified other employees brought the Union up with her and she told them they were at will employees, and that if anything went wrong there was nothing anyone could do. R. Adkins said if the Union
 20 came in the Union could negotiate their at will status. R. Adkins denied discussing benefits with employees. R. Adkins testified she never told permanent employees she supported the Union as they knew how she felt because she supported a union in a prior election campaign. R. Adkins testified she did not wear a union button or t-shirt. She testified she did not attend any union meetings, or initiate conversations with employees about the Union. R. Adkins testified
 25 on June 23 that she spoke to Pecor on June 21, and Pecor told her that she solicited cards, which she denied. R. Adkins testified she told Pecor she obtained one card for her son James Adkins. R. Adkins testified she told Pecor she did not tell employees she endorsed the Union. R. Adkins denied telling Pecor she approached several employees about the Union. Rather, she testified Pecor told her she approached employees. She denied telling Pecor that she told
 30 employees that the Union would get them just cause and stop favoritism. R. Adkins denied telling Pecor that she told employees she was for the Union. R. Adkins testified she spoke to employees about favoritism at the plant but not in relationship to the Union.

On the other hand, I found the testimony of Respondent's witnesses, considering their
 35 demeanor, and the record as a whole to be inconsistent between their prior testimony and between witnesses, contradictory to statements made in pre-hearing affidavits, and undercut by other record evidence. Dingess, who was present when R. Adkins testified at the objections hearing, testified at the unfair labor practice proceeding that the only thing Dingess could recall where R. Adkins' testimony at the objections hearing was inconsistent with what she had told
 40 Dingess prior to the hearing was R. Adkins denial at the objections hearing of obtaining signed authorization cards from certain named individuals. In her testimony at the unfair labor practice hearing, Dingess testified that during her investigatory meeting, R. Adkins told Dingess that R. Adkins obtained signed union cards from Cheryl Harbour, Heather Daniels, Barry Gaskins and James Adkins. Yet, when Dingess testified at the objections hearing she never claimed that R.
 45 Adkins had previously told Dingess that R. Adkins solicited or obtained signed cards. Similarly, Daniels, who was called as a witness by Respondent at the objections hearing, never claimed R. Adkins asked Daniels to sign a card, never claimed that she was provided a card by R. Adkins, and never claimed that she signed a card. In fact, Daniels testified during the objections hearing that Daniels was opposed to the Union.⁵¹

⁵¹ During the objections hearing, Daniels testified R. Adkins merely asked if she signed a
 Continued

Accordingly, I have credited R. Adkins' testimony that she did not solicit employees to sign union cards, and she only gave one card to her son, which he did not sign, as she testified at the hearing on objections hearing, and that she never told Respondent's officials that she engaged in such activity over their testimony to the contrary.⁵² I also find R. Adkins did not attend union meetings, did not wear union paraphernalia, and did not approach employees about the Union, and that she did not inform Respondent's officials that she did so. I find that, as she testified, prior to the determination that she was a supervisor, when asked about the Union she told employees that they were employees at will, and that if the Union got in it could try to negotiate to change their at will status. I find R. Adkins was asked, when she met Dragoo and Dingess whether she thought the Union was a good idea, and she informed them she thought it was needed because they were at will employees, and it could negotiate better benefits. I do not credit Dingess' testimony that R. Adkins also informed them that she told employees the Union could negotiate better benefits.

I find that Respondent discharged R. Adkins because she testified adversely to Respondent's position at the objections hearing, and that R. Adkins' discharge was violative of Section 8(a)(1) of the Act. See, *Glover Bottled Gas Corp.*, 275 NLRB 658, 658, fn. 7 (1985), enf'd. 801 F.2d 391 (2nd Cir. 1986), cert. denied 479 U.S. 1085 (1987); *Orkin Exterminating Co.*, 270 NLRB 404, 404, fn. 1 (1984), HH. Robertson Co., 263 NLRB 1344, 1345 (1982); *Oil City Brass Works*, 147 NLRB 627, 630 (1964), enf'd. 357 F.2d 466 (5th Cir. 1966); and *Better Monkey Grip Co.*, 115 NLRB 1170 (1956), enf'd. 243 F.2d 836 (5th Cir. 1957).⁵³ I find the General Counsel established a prima facie case the discharge was unlawfully motivated under the Board's *Wright Line* requirements in that there was knowledge of R. Adkins' protected conducted, and timing of the discharge was right after R. Adkins testified. I do not find the discharged was motivated by R. Adkins job search, or her support for the Union, as Dragoo, the decision maker behind the discharge, admitted he learned of the job search and of R. Adkins views about the Union over a month before he discharged her.⁵⁴ I find Respondent's officials

card. I would note the hearing officer apparently credited R. Adkins' testimony over that of Daniels during the objections proceeding. See, *SNE Enterprises, Inc.*, 344 NLRB No. 81, slip op. at 7 (2005).

⁵² I have considered the testimony of Pecor and Dragoo in making this determination, and did not find the testimony of either to warrant a different conclusion. Pecor's memory of his meetings with R. Adkins was not good, and his testimony at the hearing was largely undercut by that contained in his pre-hearing affidavit. Pecor's notes of his encounters with R. Adkins were sketchy, appeared to be canned questions, and I do not find them reliable as he testified he had met with several witnesses. I find that both Pecor and Dragoo were serving as advocates in their testimony rather objectively reporting facts. Dragoo claimed that R. Adkins job search and her pro-union stance played a role in her discharge, yet he admitted knowing about both a month earlier than her discharge. I find that he was espousing formulaic positions that were merely designed to buttress Respondent's defense at trial rather than truthfully testifying about what motivated the discharge.

⁵³ Since I find Respondent violated Section 8(a)(1) of the Act by discharging R. Adkins, I do not find it necessary to determine whether the discharge was also violative of Section 8(a)(4) of the Act. See, *Glover Bottled Gas Corp.*, supra., at 658, fn. 7 (1985); and *Orkin Exterminating Co.*, supra at 404, fn. 1.

⁵⁴ I do not credit Dingess' claim that R. Adkins was interviewing for a job around the time of her testimony played a role in the decision to discharge her. Dingess attended the meeting with Dragoo and R. Adkins a month earlier, in which Dragoo testified R. Adkins informed them she was looking for outside employment. Yet, Dingess incredibly denied knowledge of R. Adkins'

Continued

attempted to pressure R. Adkins to testify in a more favorable fashion to Respondent's cause then she truthfully informed them she was willing to do. When she refused to accede to that pressure they summarily discharged her. I find she did not mislead Respondent as to her testimony, and she credibly testified at the unfair labor practice proceeding that she testified in a truthful manner at the hearing on objections. I find Respondent has failed to meet its heavy burden of establishing R. Adkins perjured herself at the hearing on objections or otherwise mislead Respondent about the substance of her testimony. See *Glover Bottled Gas Corp.* supra., 658 fn. 7. Accordingly, I find her discharge was unlawfully motivated and violative of Section 8(a)(1) of the Act.⁵⁵

CONCLUSIONS OF LAW

1. Respondent violated Section 8(a)(1) of the Act:

(a) By in March 2004, and on April 2, 2004, posting a memo informing employees they would not receive a wage increase because the United Steelworkers of America, AFL-CIO-CLC had filed a representation petition.

(b) By in March 2004, and on April 2, 2004, posting a memo promising employees a wage increase if they rejected the Union as their collective bargaining representative.

(c) By on or about April 12, 2004, announcing and then maintaining a rule prohibiting employees from discussing discipline and disciplinary investigations with their coworkers.

(d) By on or about June 11, 2004, discharging its employee Dana Adkins because he engaged in protected concerted activities by discussing a disciplinary action taken against him with a co-worker in violation of Respondent's unlawful rule.

(e) By on about June 25, 2004, discharging supervisor Ruth Adkins because she testified adversely to Respondent's position at a Board proceeding.

2. Respondent violated Section 8(a)(1) and (3) of the Act:

(a) By on or about February 23, 2004, discharging employee Benny Moore because he engaged in union activities, and to discourage employees from engaging in union activities.

(b) Since on or about March 2004, withholding and continuing to withhold March and September 2004 scheduled general wage increases, as well as general increases thereafter, from its employees because employees engaged in union activities, and to discourage employees from engaging in union activities.

3. Respondent's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found Respondent has engaged in certain unfair labor practices, I find it

job search until right around the time of R. Adkins' discharge. I do not distinguish the fact that R. Adkins was going on an interview at the time of her termination as justifying her termination, for implicit in a job search is that individuals go on job interviews. Rather, I find Respondent's seizing on the interview demonstrates the pretextual nature of the reasons advanced for the discharge.

⁵⁵ I do not credit Pecor's testimony that he found it unnecessary to take an affidavit from R. Adkins during trial preparation because he had no reason to doubt her testimony. Respondent issued a June 17, letter to R. Adkins stating, "Failure to appear and testify truthfully may result in termination." I find such a letter would not have been necessary if Respondent's officials were sure of the content of R. Adkins' testimony, and that, in the circumstances here, the letter was a veiled threat of discharge if R. Adkins did not testify in a manner to Respondent's officials liking.

must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Respondent having unlawfully discriminatorily discharged Benny Moore, Dana Adkins, and Ruth Adkins must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of their discharges to the date of a proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

It is also recommended that Respondent promptly pay its employees, including any eligible employees who have since left Respondent's employ, the biannual general wage increases that it promised its employees that would take effect in March and September 2004, and any general wage increases it has withheld thereafter because of their union activities, plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Since Respondent had not promised a specific amount, the increases will be the amount Respondent would have paid but for its illegal withdrawal of its promised increases. The exact amount of the increases can be determined in a compliance proceeding if the parties are unable to voluntarily agree on a precise figure. See, *Otis Hospital*, 222 NLRB 402, 405 (1976), enfd. 545 F.2d 252 (1st Cir. 1976); and *Autozone, Inc.*, 315 NLRB 115, 145-146 (1994), enfd. 83 F.3d 422 (6th Cir. 1994).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁵⁶

ORDER

The Respondent, SNE Enterprises, Inc., located at Huntington, West Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Informing employees they would not receive a wage increase because the United Steelworkers of America, AFL-CIO-CLC had filed a representation petition.

(b) Promising employees a wage increase if they rejected the Union as their collective bargaining representative.

(c) Announcing and maintaining a rule prohibiting employees from discussing discipline and disciplinary investigations with their coworkers.

(d) Discharging employees because they engage in protected concerted activities by discussing disciplinary actions with their co-workers in violation of an unlawful rule.

(e) Discharging supervisors because they testify adversely to Respondent's interest at National Labor Relations Board proceedings.

(f) Discharging employees because they engage in Union activities, and to discourage employees from engaging in union activities.

(g) Withholding and continuing to withhold March and September 2004 scheduled general wage increases, as well as general increases thereafter, from its employees because employees engaged in union activities, and to discourage employees from engaging in union activities.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

⁵⁶ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

2. Take the following affirmative action to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer employees Benny Moore and Dana Adkins, and supervisor Ruth Adkins full reinstatement to their former positions or, if those positions no longer exist, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed, discharging any employee, or lead person, if necessary.

(b) Make Benny Moore, Dana Adkins, and Ruth Adkins whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful termination of Benny Moore, Dana Adkins, and Ruth Adkins, and within 3 days thereafter notify them in writing that this has been done and that the terminations will not be used against them in any way.

(d) Pay to its employees the general wage increases that were withheld in March and September 2004, and any general wage increases that were withheld thereafter because of employees' union activities, plus interest, in the manner described in the remedy section of this decision.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place to be designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of back pay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Huntington, West Virginia, location copies of the attached notice marked "Appendix."⁵⁷ Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed its operations at Huntington, West Virginia, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 23, 2004.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C.

Eric M. Fine
Administrative Law Judge

⁵⁷ If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX
NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT inform employees they will not receive a wage increase because the United Steelworkers of America, AFL-CIO-CLC had filed a representation petition.

WE WILL NOT promise employees a wage increase if they reject the Union as their collective bargaining representative.

WE WILL NOT announce or maintain a rule prohibiting employees from discussing discipline and disciplinary investigations with their coworkers.

WE WILL NOT discharge employees because they violate our unlawful rule and engage in protected concerted activities by discussing discipline or disciplinary investigations with their co-workers.

WE WILL NOT discharge supervisors because they testify adversely to our interest at National Labor Relations Board proceedings.

WE WILL NOT discharge employees because they engage in union activities, and to discourage employees from engaging in union activities.

WE WILL NOT withhold and continue to withhold March and September 2004 general wage increases, and general wage increases thereafter, from employees because employees engaged in union activities, and to discourage employees from engaging in union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer employees Benny Moore and Dana Adkins, and supervisor Ruth Adkins full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Benny Moore, Dana Adkins, and Ruth Adkins whole for any loss of earnings and other benefits suffered as a result of their unlawful termination in the manner set forth in Board's decision.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful terminations of Benny Moore, Dana Adkins, and Ruth Adkins, and within 3 days thereafter notify them in writing that this has been done and that their terminations will not be used against them in any way.

WE WILL pay to our employees, and eligible former employees, the general wage increases that were withheld in March and September 2004, and any general wage increases that were withheld thereafter because of our employees' union activities, plus interest, in the manner described in the Board's decision.

SNE ENTERPRISES, INC.

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

550 Main Street, Federal Office Building, Room 3003

Cincinnati, Ohio 45202-3271

Hours: 8:30 a.m. to 5 p.m.

513-684-3686.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S

COMPLIANCE OFFICER, 513-684-3750.